A. I. R. COMMENTARIES

THE
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OF
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BY

V. V. CHITALEY AND S. APPU RAO

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A. I. R. Commentaries

THE
CONSTITUTION OF INDIA

WITH
EXHAUSTIVE, ANALYTICAL AND CRITICAL COMMENTARIES

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PREFACE

(Reprinted from 1st Volume)

The Indian Constitution has been the subject of a number of treatises within the short time since the completion of the Constitution. The matter has been dealt with in different forms and from different approaches in the books so far published. Broadly speaking, there are three classes of books on the subject : (i) Commentaries : In this class of books, the articles of the Constitution are dealt with *seriatim* and commented upon with the help of case-law and other authorities ; (ii) General surveys and summaries : in this class of books, the Constitution is surveyed as a whole with the author's comments and criticisms ; and (iii) Books dealing with special subjects like fundamental rights and writ proceedings. The present book is planned to fall in the first category mentioned above. It has been prepared on the well-known A. I. R. system of Commentary, which, while it has its critics, has been found to satisfy the needs of the profession better than other methods of law book writing. The nature of the subject, however, has necessitated the moulding of the usual A. I. R. system to its own special requirements. It has been considered that the value of the book will be enhanced if the principles of law stated are copiously supported by quotations from the leading judgments bearing on the principles. Hence, the book not only cites the references for the cases which are relied on for the several propositions but the discussion is throughout reinforced by quotations from judgments. This has got a double result : Firstly, it enables the reader to have the statement of the law in the very words of the eminent judges who have expounded the law. Secondly, it enhances the readable quality of the book by the inclusion of numerous passages of fine English prose dealing with such inspiring topics as personal liberty, rule of law, right of equality and so on.

It is well known that our Constitution is based on a study of the various Constitutions of the world and incorporates several ideas and conceptions borrowed from other Constitutions. But three main sources may be specially mentioned. First is the American Constitution which is generally regarded as a model of a Federal Constitution. On the subject of fundamental rights, judicial enquiry into validity of laws, inter-state commerce, etc., American decisions afford a most valuable source of guidance for our Courts, although, no doubt, there are fundamental features of difference between the American Constitution and our own Constitution which necessitate circumspection and caution while applying American precedents to the solution of our own problems. Secondly, in regard to writ proceedings, which are a special and, next to fundamental rights, perhaps the most prominent feature of the Indian Constitution, English case-law is invaluable, because our Constitution-makers have, in borrowing the terminology of English law to describe the writs, evidently intended that our Courts should be guided by the principles of English law in this respect as far as possible. English decisions also constitute a valuable source of legal principles on other topics covered by the Commentary. Thirdly, the Constitution is in many places an adaptation of the Government of India Act, 1935. The result of this is that the decisions on the Government of India Act are also useful in interpreting and understanding our Constitution. Case-law has, therefore, been tapped from all these sources in the preparation of this Commentary.

Comparisons with other Constitutions and with the Government of India Act have been incorporated in the body of the Commentary itself in appropriate places.

The text of the American Constitution will be given in the Appendix and it is proposed to include various other items of a useful nature in the Appendices at the end of the last volume.

* * * * * * *

The Authors express their thanks to Messrs. D. V. Chitaley, B.A., LL.B., Advocate, D. W. Chitaley, B. A., LL. B., D. G. Ranade, V. S. Balkundi, B. A., LL. B., R. G. Dhoble, B.A., LL.B., V. B. Bakhale, M.A., LL.B., D. H. Zadgaonkar, B.A., LL.B., K. S. Bakre, B.SC., LL.B., D. R. Rajandekar, B.A., LL.B., G. M. Jatar, B.A., LL.B., M. Kuppuswami, B.A., B.L., Advocate, H. G. Pathak, B.A., LL.B., and G. B. Sidhaye, B.A., LL.B., Advocate, for help received in the preparation of the book. It is but fair to add, however, that of these gentlemen, the authors feel specially obliged to Mr. V. B. Bakhale, who has borne the main brunt of assisting them in all the stages of the work.

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V. V. Chitaley

13th January, 1954.

S. Appu Rao.

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ABBREVIATIONS

REPORTS

A.I.R. 1914 All., Bom., etc. ... All India Reporter, Allahabad, Bombay, etc., sections of the respective years.

A. M. L. J. ... Ajmer-Merwara Law Journal.

Agra. H. C. R. ... Agra High Court Reports.

All. or I. L. R. All. ... Indian Law Reports, Allahabad Series.

All. L. Jour. ... Allahabad Law Journal.

All. W. N. ... Allahabad Weekly Notes.

All. W. R. ... Allahabad Weekly Reporter.

Andhra W. R. ... Andhra Weekly Reporter.

I. L. R. Assam ... Indian Law Reports, Assam Series.

Avadh W. N. ... Avadh (or Oudh) Weekly Notes.

B. R. ... Bihar Reports.

Beng. L. R. ... Bengal Law Reports.

B. L. J. R. or Bihar L. J. R. ... Bihar Law Journal Reports.

Bom. or I. L. R. Bom. ... Indian Law Reports, Bombay Series.

Bom. H. C. R. ... Bombay High Court Reports.

Bom. L. R. ... Bombay Law Reporter.

Bom. P. J. ... Bombay Printed Judgments.

Bur. L. Jour. ... Burma Law Journal.

Bur. L. R. ... Burma Law Reports.

Bur. L. Tim. ... Burma Law Times.

Cal. or I. L. R. Cal. ... Indian Law Reports, Calcutta Series.

Cal. L. Jour. ... Calcutta Law Journal.

Cal. L. R. ... Calcutta Law Reports.

Cal. W. N. ... Calcutta Weekly Notes.

Cal. W. N. (D. R.) ... Calcutta Weekly Notes (Dacca Reports).

C. P. L. R. ... Central Provinces Law Reports.

Cr. or Cri. L. Jour. ... Criminal Law Journal.

I. L. R. Cut. ... Indian Law Reports, Cuttack Series.

Cut. L. T. ... Cuttack Law Times.

E. P. or East Punjab ... East Punjab.

I. L. R. E. P. or East Punj. ... Indian Law Reports, East Punjab Series.

F. C. R. ... Federal Court Reports.

F. L. J. ... Federal Law Journal.

Hyd. or I. L. R. Hyd. ... Indian Law Reports, Hyderabad Series.

Ind. App. ... Law Reports, Indian Appeals.

Ind. Cas. ... Indian Cases.

I. T. R. ... Income Tax Reports.

J. & K. ... Jammu & Kashmir.

J. & K. L. R. ... Jammu & Kashmir Law Reports.

J. L. R. or Jaipur L. R. ... Jaipur Law Reports.

I. L. R. Kar. ... Indian Law Reports, Karachi Series.

K. L. T. or Ker. L. T. ... Kerala Law Times.

Lab. L. J. ... Labour Law Journal.

ABBREVIATIONS *(contd.)*

I. L. R. Lah. ... Indian Law Reports, Lahore Series.

Lah. L. Jour. ... Lahore Law Journal.

Lah. L. T. ... Lahore Law Times.

L. R. A. ... Law Reporter, Allahabad.

Low. Bur. Rul. ... Lower Burma Rulings.

Luck. or I. L. R. Luck. ... Indian Law Reports, Lucknow Series.

Madh. B. or M. B. ... Madhya Bharat.

Madh. B. L. J. ... Madhya Bharat Law Journal

Madh. B. L. R. ... Madhya Bharat Law Reporter.

Mad. or I. L. R. Mad. ... Indian Law Reports, Madras Series.

Mad. H. C. R. ... Madras High Court Reports.

Mad. L. Jour. ... Madras Law Journal.

Mad. L. Tim. ... Madras Law Times.

Mad. L. W. ... Madras Law Weekly.

Mad. W. N. ... Madras Weekly Notes.

M. L. R. or Marwar L. R. ... Marwar Law Reporter.

Moo. Ind. App. ... Moore's Indian Appeals.

Moo. P. C. C. ... Moore's Privy Council Cases.

Mys. ... Mysore.

I. L. R. Mys. ... Indian Law Reports, Mysore Series.

Mys. H. C. R. ... Mysore High Court Reports.

Mys. L. J. ... Mysore Law Journal.

I. L. R. Nag. ... Indian Law Reports, Nagpur Series.

Nag. L. Jour. ... Nagpur Law Journal.

Nag. L. R. ... Nagpur Law Reports.

N. U. C. ... Notes of Unreported Cases of A. I. R.

N.-W. P. H. C. R. ... North-West - Provinces High Court Reports.

Oudh Cas. ... Oudh Cases.

Oudh L. Jour. ... Oudh Law Journal.

Oudh L. R. ... Oudh Law Reports.

Oudh S. C. ... Oudh Select Cases.

Oudh W. N. ... Oudh Weekly Notes.

Pak. Cas. ... Pakistan Cases.

Pak. L. R. Lahore ... Pakistan Law Reports, Lahore.

Pat. or I. L. R. Pat. ... Indian Law Reports, Patna Series.

Pat. L. Jour. ... Patna Law Journal.

Pat. L. Tim. ... Patna Law Times.

Pat. L. W. ... Patna Law Weekly.

Pat. W. N. ... Patna Weekly Notes.

I. L. R. Patiala ... Indian Law Reports, Patiala Series.

Pepsu L. R. ... Pepsu Law Reports.

I. L. R. Punj. ... Indian Law Reports, Punjab Series.

Pun. L. R. ... Punjab Law Reporter.

Pun. Re. ... Punjab Records.

Pun. W. R. ... Punjab Weekly Reporter.

I. L. R. Raj. ... Indian Law Reports, Rajasthan Series.

R. L. W. or Raj. L. W. ... The Rajasthan Law Weekly.

Rang. or I. L. R. Rang. ... Indian Law Reports, Rangoon Series.

Rang. L. R. ... Rangoon Law Reports.

Rat. or Rat. Un. Cr. C. ... Ratanlal's Unreported Criminal Cases.

R. D. ... Revenue Decisions.

Sau. ... Saurashtra.

Sau. L. R. ... Saurashtra Law Reporter.

Sind L. R. ... Sind Law Reporter.

S. C. J. ... Supreme Court Journal.

S. C. R. ... Supreme Court Reports.

Suth. W. R. ... Sutherland's Weekly Reporter.

I. L. R. Trav. Co. or T. C. ... Indian Law Reports, Travancore-Cochin Series.

T. C. L. R. or Trav. Co. L. R. ... Travancore-Cochin Law Reports.

T. L. J. or Trav. L. J. ... Travancore Law Journal.

U. P. L. R. ... United Provinces Law Reports.

Upp. Bur. Rul. ... Upper Burma Rulings.

Vind.-Pra. or V. P. ... Vindhya Pradesh.

Weir. ... Weir's Criminal Rulings.

ABBREVIATIONS *(contd.)*

ENGLISH, IRISH, SCOTTISH, AMERICAN AND AUSTRALIAN LAW REPORTS

All E. R. ... All England Law Reports.
A. L. R. ... American Law Reports Annotated.
App. Cas. ... (Law Reports) Appeal Cases.
Camp. ... Campbell's Reports.
Ch. App. ... (Law Reports) Chancery Appeals (1865-75).
Ch. D. ... (Law Reports) Chancery Division (1876-1890).
Cl. & Fin. ... Clark and Finnelly [House of Lords].
C. P. ... (Law Reports) Common Pleas (1865-1875).
C. P. D. ... (Law Reports) Common Pleas Division (1875-1880).
C. L. R. or Com. L. R. ... Commonwealth Law Reports.
Cox Cr. C. ... Cox Criminal Law Cases.
Craw. & D. ... Crawford and Dix's Circuit Cases (Ireland).
Den. ... Denison's Crown Cases Reserved.
E. R. ... English Reports.
Eq. ... (Law Reports) Equity (1866-1875).
Eq. R. ... Equity Reports (1853-1855).
Eq. Cas. Abr. ... Abridgment of Cases in Equity (1667-1744).
Ex. or Exch. ... (Law Reports) Exchequer.
Ex. D. ... (Law Reports) Exchequer Division (1875-1880).
Hag. Con. ... Haggard's Consistorial Reports.
H. L. ... (Law Reports) House of Lords.
H. L. C. ... House of Lords Cases (continuation of Clark and Finnelly).
How. ... Howard's Reports.
I. R. ... Irish Reports.
J. P. ... Justice of the Peace.
K. B. ... (Law Reports) King's Bench, Division.
L. J. Adm. ... Law Journal Reports of Admiralty.
L. J. Bcy. ... Law Journal Reports of Bankruptcy.
L. J. C. P. ... Law Journal Reports, Common Pleas.
L. J. Ch. ... Law Journal Reports, Chancery.
L. J. Ex. ... Law Journal Reports, Exchequer.
L. J. K. B. ... Law Journal Reports, King's Bench.
L. J. M. C. ... Law Journal Reports, Magistrates' Cases.
L. J. P. ... Law Journal Reports, Probate, Divorce and Admiralty.
L. J. P. & M. ... Law Journal Reports, Probate and Matrimonial Cases.
L. J. P. C. ... Law Journal Reports, Privy Council.
L. J. P. M. & A. ... Law Journal Reports, Probate, Matrimonial and Admiralty Cases.
L. J. Q. B. ... Law Journal Reports, Queen's Bench.
L. T. ... Law Times Reports.
L. T. (N. S.) ... Law Times Reports (New Series).
L. T. (O. S.) ... Law Times Reports (Old Series).
Law. Ed. ... Lawyers' Edition (Supreme Court of U. S.).
Leach ... Leach's Crown Cases.
Lew. Cr. C. ... Lewin's Crown Cases on the Northern Circuit.
Mood C. C. ... Moody's Crown Cases Reserved.
Moo. & P. ... Moore and Payne's Reports, Common Pleas.
My. & Cr. ... Mylne and Craig's Reports, Chancery.
P. C. ... (Law Reports) Privy Council.
P. & D. ... (Law Reports) Probate and Divorce Cases.
P. or P. D. ... (Law Reports) Probate Division.
Q. B. ... (Law Reports) Queen's Bench (1891 onwards) or Queen's Bench Reports (1841 to 1852).
Q. B. D. ... (Law Reports) Queen's Bench Division (1875-1890).
R. R. ... Revised Reports.
Smith ... J. P. Smith's Reports [King's Bench].
State Tr. ... State Trials.
T. L. R. ... Times Law Reports.
U. S. ... Cases Argued and Decided in the Supreme Court of the United States.
Wall ... Wallace's Reports (Supreme Court of U. S.).
Wheat ... Wheaton's Reports (Supreme Court of U. S.).
W. N. ... (Law Reports) Weekly Notes.
W. L. R. ... The Weekly Law Reports.
W. R. (Eng.) ... Weekly Reporter (England).

ABBREVIATIONS *(concld.)*

Other Abbreviations.

Appr.	Approved.
Art.	Article.
B. R.	Board of Revenue.
C.	Case Number.
C. A.	Court of Appeal.
Civ.	Civil.
Cl.	Clause.
Cons.	Considered.
Cr.	Criminal.
Diss.	Dissented.
Dist.	Distinguished.
D. B.	Division Bench.
Expl.	Explained.
F. A.	First Appeal.
F. B.	Full Bench.
F. C.	Federal Court.
Foll.	Followed.
G. I.	Government of India.
(1946-52) I. D. 225	1946-1952 Indian Digest Point Number 225.
1952 I. D. A.	1952 Indian Digest Annual Part.

I. O.	The Indian (Adaptation of Existing Laws) Order, 1947.
Illu.	Illustrations.
Jour.	Journal.
L. P.	Letters Patent.
N.	Note.
No.	Number.
O.	Order.
Over.	Overruled.
P.	Page.
Pr.	Para.
Pt.	Point.
P. C.	Privy Council.
Pre.	Preamble.
R.	Rule.
Ref.	Referred or Reference.
Rel. on.	Relied on.
Rev.	Revenue.
S.	Section.
S. A.	Second Appeal.
S. B.	Special Bench.
S. C.	Supreme Court.
V.	Volume Number.
Y. D. F.	Yearly Digest Fortnightly.

IN THE FOOT-NOTES TO THE COMMENTARY —

(a) ('66) means (1866); ('04) means (1904); ('27) means (1927); ('39) means 1939.

(b) Full year reference is given prior to 1866, like (1818) and *not* ('18); (1865) and *not* ('65) and so on, and to all Foreign cases.

(c) The method of citation of A. I. R. is slightly changed. It is, for example, thus: 1955 Cal. 101 (Pr. 14) [(S) A I R V 42 C 25]. In the square bracket '(S)' indicates that the case is included in Select Edition also, V stands for volume, the figure 42 denotes the 42nd volume of the All India Reporter, "1914" being the first volume, C stands for Case Number and Pr. stands for Para of the judgment.

THE
CONSTITUTION OF INDIA

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299. Contracts.
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PART XI

RELATIONS BETWEEN THE UNION AND THE STATES

CHAPTER I. — LEGISLATIVE RELATIONS

Distribution of Legislative Powers

Extent of laws made by Parliament and by the Legislatures of States.

245. (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

Subject-matter of laws made by Parliament and by the Legislatures of States.

246. (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State specified in Part A or Part B of the First Schedule also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of any State specified in Part A or Part B of the First Schedule has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in Part A or Part B of the First Schedule notwithstanding that such matter is a matter enumerated in the State List.

Power of Parliament to provide for the establishment of certain additional Courts.

247. Notwithstanding anything in this Chapter, Parliament may by law provide for the establishment of any additional Courts for the better administration of laws made by Parliament or of any existing law with respect to a matter enumerated in the Union List.

Residuary powers of legislation.

248. (1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

Power of Parliament to legislate with respect to a matter in the State List in the national interest.

249. (1) Notwithstanding anything in the foregoing provisions of this Chapter, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force.

(2) A resolution passed under clause (1) shall remain in force for such period not exceeding one year as may be specified therein:

Provided that, if and so often as a resolution approving the continuance in force of any such resolution is passed in the manner provided in clause (1), such resolution shall continue in force for a further period of one year from the date on which under this clause it would otherwise have ceased to be in force.

(3) A law made by Parliament which Parliament would not but for the passing of a resolution under clause (1) have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period.

Power of Parliament to legislate with respect to any matter in the State List if a Proclamation of Emergency is in operation.

250. (1) Notwithstanding anything in this Chapter, Parliament shall, while a Proclamation of Emergency is in operation, have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List.

(2) A law made by Parliament which Parliament would not but for the issue of a Proclamation of Emergency have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.

Inconsistency between laws made by Parliament under Articles 249 and 250 and laws made by the Legislatures of States.

251. Nothing in Articles 249 and 250 shall restrict the power of the Legislature of a State to make any law which under this Constitution it has power to make, but if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament has under either of the said articles power to make, the law made by Parliament, whether passed before or after the law made by the Legislature of the State, shall prevail, and the law made by the Legislature of the State shall to the extent of the repugnancy, but so long only as the law made by Parliament continues to have effect, be inoperative.

Power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State.

252. (1) If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in Articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the Houses of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State.

(2) Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State.

Legislation for giving effect to international agreements.

253. Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

Inconsistency between laws made by Parliament and laws made by the Legislatures of States.

254. (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extend of the repugnancy, be void.

(2) Where a law made by the Legislature of a State specified in Part A or Part B of the First Schedule with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State :

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

Requirements as to recommendations and previous sanctions to be regarded as matters of procedure only.

255. No Act of Parliament or of the Legislature of a State specified in Part A or Part B of the First Schedule, and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to that Act was given—

(*a*) where the recommendation required was that of the Governor, either by the Governor or by the President;

(*b*) where the recommendation required was that of the Rajpramukh, either by the Rajpramukh or by the President;

(*c*) where the recommendation or previous sanction required was that of the President, by the President.

CHAPTER.— II ADMINISTRATIVE RELATIONS

General

Obligation of States and the Union.

256. The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

Control of the Union over States in certain cases.

257. (1) The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

(2) The executive power of the Union shall also extend to the giving of directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance:

Provided that nothing in this clause shall be taken as restricting the power of Parliament to declare highways or waterways to be national highways or national waterways or the power of the Union with respect to the highways or waterways so declared or the power of the Union to construct and maintain means of communication as part of its functions with respect to naval, military and air force works.

(3) The executive power of the Union shall also extend to the giving of directions to a State as to the measures to be taken for the protection of the railways within the State.

(4) Where in carrying out any direction given to a State under clause (2) as to the construction or maintenance of any means of communication or under clause (3) as to the measures to be taken for the protection of any railway, costs have been incurred in excess of those which would have been incurred in the discharge of the normal duties of the State if such direction had not been given, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of the extra costs so incurred by the State.

Power of the Union to confer powers, etc., on States in certain cases.

258. (1) Notwithstanding anything in this Constitution, the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends.

(2) A law made by Parliament which applies in any State may, notwithstanding that it relates to a matter with respect to which the Legislature of the State has no power to make laws, confer powers and impose duties, or authorise the conferring of powers and the imposition of duties, upon the State or officers and authorities thereof.

(3) Where by virtue of this article powers and duties have been conferred or imposed upon a State or officers or authorities thereof, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the State in connection with the exercise of those powers and duties.

Armed Forces in States in Part B of the First Schedule.

259. (1) Notwithstanding anything in this Constitution, a State specified in Part B of the First Schedule having any Armed Forces immediately before the commencement of this Constitution may, until Parliament by law otherwise provides, continue to maintain the said Forces after such commencement subject to such general or special orders as the President may from time to time issue in that behalf.

(2) Any such Armed Forces as are referred to in clause (1) shall form part of the Armed Forces of the Union.

Jurisdiction of the Union in relation to territories outside India.

260. The Government of India may by agreement with the Government of any territory not being part of the territory of India undertake any executive, legislative or judicial functions vested in the Government of such territory, but every such agreement shall be subject to, and governed by, any law relating to the exercise of foreign jurisdiction for the time being in force.

261. (1) Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State.

Public acts, records and judicial proceedings.

(2) The manner in which and the conditions under which the acts, records and proceedings referred to in clause (1) shall be proved and the effect thereof determined shall be as provided by law made by Parliament.

(3) Final judgments or orders delivered or passed by civil Courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law.

Disputes relating to Waters

262. (1) Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-State river or river valley.

Adjudication of disputes relating to waters of inter-State rivers or river valleys.

(2) Notwithstanding anything in this Constitution, Parliament may by law provide that neither the Supreme Court nor any other Court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (1).

Co-ordination between States

263. If at any time it appears to the President that the public interests would be served by the establishment of a Council charged with the duty of—

Provisions with respect to an Inter-State Council.

(*a*) inquiring into and advising upon disputes which may have arisen between States ;

(*b*) investigating and discussing subjects in which some or all of the States, or the Union and one or more of the States, have a common interest ; or

(*c*) making recommendations upon any such subject and in particular, recommendations for the better co-ordination of policy and action with respect to that subject,

it shall be lawful for the President by order to establish such a Council, and to define the nature of the duties to be performed by it and its organisation and procedure.

PART XII

FINANCE, PROPERTY, CONTRACTS AND SUITS

CHAPTER I.—FINANCE

General

Interpretation.

264. In this Part, unless the context otherwise requires,—

(*a*) "Finance Commission" means a Finance Commission constituted under Article 280;

(*b*) "State" does not include a State specified in Part C of the First Schedule;

(*c*) references to States specified in Part C of the First Schedule shall include references to any territory specified in Part D of the First Schedule and any other territory comprised within the territory of India but not specified in that Schedule.

Taxes not to be imposed save by authority of law.

265. No tax shall be levied or collected except by authority of law.

Consolidated Funds and public accounts of India and of the States.

266. (1) Subject to the provisions of Article 267 and to the provisions of this Chapter with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to States, all revenues received by the Government of India, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of India," and all revenues received by the Government of a State, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of the State."

(2) All other public moneys received by or on behalf of the Government of India or the Government of a State shall be credited to the public account of India or the public account of the State, as the case may be.

(3) No moneys out of the Consolidated Fund of India or the Consolidated Fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution.

Contingency Fund.

267. (1) Parliament may by law establish a Contingency Fund in the nature of an imprest to be entitled "the Contingency Fund of India" into which shall be paid from time to time such sums as may be determined by such law, and the said Fund shall be placed at the disposal of the President to enable advances to be made by him out of such Fund for the purposes of meeting unforeseen expenditure pending authorisation of such expenditure by Parliament by law under Article 115 or Article 116.

(2) The Legislature of a State may by law establish a Contingency Fund in the nature of an imprest to be entitled "the Contingency Fund of the State" into which shall be paid from time to time such sums as may be determined by such law, and the said Fund shall be placed at the disposal of the Governor or Rajpramukh of the State to enable advances to be made by him out of such Fund for the purposes of meeting unforeseen expenditure pending authorisation of such expenditure by the Legislature of the State by law under Article 205 or Article 206.

Distribution of Revenues between the Union and the States

Duties levied by the Union but collected and appropriated by the States.

268. (1) Such stamp duties and such duties of excise on medicinal and toilet preparations as are mentioned in the Union List shall be levied by the Government of India but shall be collected—

(*a*) in the case where such duties are leviable within any State specified in Part C of the First Schedule, by the Government of India, and

(*b*) in other cases, by the States within which such duties are respectively leviable.

(2) The proceeds in any financial year of any such duty leviable within any State shall not form part of the Consolidated Fund of India, but shall be assigned to that State.

Taxes levied and collected by the Union but assigned to the States.

269. (1) The following duties and taxes shall be levied and collected by the Government of India but shall be assigned to the States in the manner provided in clause (2), namely :—

(*a*) duties in respect of succession to property other than agricultural land ;

(*b*) estate duty in respect of property other than agricultural land ;

(*c*) terminal taxes on goods or passengers carried by railway, sea or air ;

(*d*) taxes on railway fares and freights ;

(*e*) taxes other than stamp duties on transactions in stock-exchanges and futures markets ;

(*f*) taxes on the sale or purchase of newspapers and on advertisements published therein.

(2) The net proceeds in any financial year of any such duty or tax, except in so far as those proceeds represent proceeds attributable to States

specified in Part C of the First Schedule, shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that duty or tax is leviable in that year, and shall be distributed among those States in accordance with such principles of distribution as may be formulated by Parliament by law.

Taxes levied and collected by the Union and distributed between the Union and the States.

270. (1) Taxes on income other than agricultural income shall be levied and collected by the Government of India and distributed between the Union and the States in the manner provided in clause (2).

(2) Such percentage, as may be prescribed, of the net proceeds in any financial year of any such tax, except in so far as those proceeds represent proceeds attributable to States specified in Part C of the first Schedule or to taxes payable in respect of Union emoluments, shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that tax is leviable in that year, and shall be distributed among those States in such manner and from such time as may be prescribed.

(3) For the purposes of clause (2), in each financial year such percentage as may be prescribed of so much of the net proceeds of taxes on income as does not represent the net proceeds of taxes payable in respect of Union emoluments shall be deemed to represent proceeds attributable to States specified in Part C of the First Schedule.

(4) In this article—

(*a*) "taxes on income" does not include a corporation tax;

(*b*) "prescribed" means—

(*i*) until a Finance Commission has been constituted, prescribed by the President by order, and

(*ii*) after a Finance Commission has been constituted, prescribed by the President by order after considering the recommendations of the Finance Commission;

(*c*) "Union emoluments" includes all emoluments and pensions payable out of the Consolidated Fund of India in respect of which income-tax is chargeable.

Surcharge on certain duties and taxes for purposes of the Union.

271. Notwithstanding anything in Articles 269 and 270, Parliament may at any time increase any of the duties or taxes referred to in those articles by a surcharge for purposes of the Union and the whole proceeds of any such surcharge shall form part of the Consolidated Fund of India.

Taxes which are levied and collected by the Union and may be distributed between the Union and the States.

272. Union duties of excise other than such duties of excise on medicinal and toilet preparations as are mentioned in the Union List shall be levied and collected by the Government of India, but, if Parliament by law so provides, there shall be paid out of the Consolidated Fund of India to the States to which the law imposing the duty extends sums equivalent to the whole or any part of the net proceeds of that duty, and those sums shall be distributed among those States in accordance with such principles of distribution as may be formulated by such law.

Grants in lieu of export duty on jute and jute products.

273. (1) There shall be charged on the Consolidated Fund of India in each year as grants-in-aid of the revenues of the States of Assam, Bihar, Orissa and West Bengal, in lieu of assignment of any share of the net proceeds in each year of export duty on jute and jute products to those States, such sums as may be prescribed.

(2) The sums so prescribed shall continue to be charged on the Consolidated Fund of India so long as any export duty on jute or jute products continues to be levied by the Government of India or until the expiration of ten years from the commencement of this Constitution, whichever is earlier.

(3) In this article, the expression "prescribed" has the same meaning as in Article 270.

Prior recommendation of President required to Bills affecting taxation in which States are interested.

274. (1) No Bill or amendment which imposes or varies any tax or duty in which States are interested, or which varies the meaning of the expression "agricultural income" as defined for the purposes of the enactments relating to Indian income-tax, or which affects the principles on which under any of the foregoing provisions of this Chapter moneys are or may be distributable to States, or which imposes any such surcharge for the purposes of the Union as is mentioned in the foregoing provisions of this Chapter, shall be introduced or moved in either House of Parliament except on the recommendation of the President.

(2) In this article, the expression "tax or duty in which States are interested" means—

(*a*) a tax or duty the whole or part of the net proceeds whereof are assigned to any State; or

(*b*) a tax or duty by reference to the net proceeds whereof sums are for the time being payable out of the Consolidated Fund of India to any State.

Grants from the Union to certain States.

275. (1) Such sums as Parliament may by law provide shall be charged on the Consolidated Fund of India in each year as grants-in-aid of the revenues of such States as Parliament may determine to be in need of assistance, and different sums may be fixed for different States :

Provided that there shall be paid out of the Consolidated Fund of India as grants-in-aid of the revenues of a State such capital and recurring sums as may be necessary to enable that State to meet the costs of such schemes of development as may be undertaken by the State with the approval of the Government of India for the purpose of promoting the welfare of the Scheduled Tribes in that State or raising the level of administration of the Scheduled Areas therein to that of the administration of the rest of the areas of that State :

Provided further that there shall be paid out of the Consolidated Fund of India as grants-in-aid of the revenues of the State of Assam sums, capital and recurring, equivalent to—

(*a*) the average excess of expenditure over the revenues during the two years immediately preceding the commencement of this Constitution in respect of the administration of the tribal areas specified in Part A of the table appended to Parargaph 20 of the Sixth Schedule ; and

(*b*) the costs of such schemes of development as may be undertaken by that State with the approval of the Government of India for the purpose of raising the level of administration of the said areas to that of the administration of the rest of the areas of that State.

(2) Until provision is made by Parliament under clause (1), the powers conferred on Parliament under that clause shall be exercisable by the President by order and any order made by the President under this clause shall have effect subject to any provision so made by Parliament :

Provided that after a Finance Commission has been constituted no order shall be made under this clause by the President except after considering the recommendations of the Finance Commission.

Taxes on professions, trades, callings and employments.

276. (1) Notwithstanding anything in Article 246, no law of the Legislature of a State relating to taxes for the benefit of the State or of a municipality, district board, local board or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income.

(2) The total amount payable in respect of any one person to the State or to any one municipality, district board, local board or other local authority in the State by way of taxes on professions, trades, callings and employments shall not exceed two hundred and fifty rupees per annum :

Provided that if in the financial year immediately preceding the commencement of this Constitution there was in force in the case of any State or any such municipality, board or authority a tax on professions, trades, callings or employments the rate, or the maximum rate, of which exceeded two hundred and fifty rupees per annum, such tax may continue to be levied until provision to the contrary is made by Parliament by law, and any law so made by Parliament may be made either generally or in relation to any specified States, municipalities, boards or authorities.

(3) The power of the Legislature of a State to make laws as aforesaid with respect to taxes on professions, trades, callings and employments shall not be construed as limiting in any way the power of Parliament to make laws with respect to taxes on income accruing from or arising out of professions, trades, callings and employments.

Savings.

277. Any taxes, duties, cesses or fees which, immediately before the commencement of this Constitution, were being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of the State, municipality, district or other local area may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Union List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by Parliament by law.

Agreement with States in Part B of the First Schedule with regard to certain financial matters.

278. (1) Notwithstanding anything in this Constitution, the Government of India may, subject to the provisions of clause (2), enter into an agreement with the Government of a State specified in Part B of the First Schedule with respect to—

(*a*) the levy and collection of any tax or duty leviable by the Government of India in such State and for the distribution of the proceeds thereof otherwise than in accordance with the provisions of this Chapter ;

(*b*) the grant of any financial assistance by the Government of India to such State in consequence of the loss of any revenue which that State used to derive from any tax or duty leviable under this Constitution by the Government of India or from any other sources;

(*c*) the contribution by such State in respect of any payment made by the Government of India under clause (1) of Article 291,

and, when an agreement is so entered into, the provisions of this Chapter shall in relation to such State have effect subject to the terms of such agreement.

(2) An agreement entered into under clause (1) shall continue in force for a period not exceeding ten years from the commencement of this Constitution :

Provided that the President may at any time after the expiration of five years from such commencement terminate or modify any such agreement if after consideration of the report of the Finance Commission he thinks it necessary to do so.

279. (1) In the foregoing provisions of this Chapter, "net proceeds" means in relation to any tax or duty the proceeds thereof reduced by the cost of collection, and for the purposes of those provisions the net proceeds of any tax or duty, or of any part of any tax or duty, in or attributable to any area shall be ascertained and certified by the Comptroller and Auditor-General of India, whose certificate shall be final.

Calculation of "net proceeds", etc.

(2) Subject as aforesaid, and to any other express provision of this Chapter, a law made by Parliament or an order of the President may, in any case where under this Part the proceeds of any duty or tax are, or may be, assigned to any State, provide for the manner in which the proceeds are to be calculated, for the time from or at which and the manner in which any payments are to be made, for the making of adjustments between one financial year and another, and for any other incidental or ancillary matters.

280. (1) The President shall, within two years from the commencement of this Constitution and thereafter at the expiration of every fifth year or at such earlier time as the President considers necessary, by order constitute a Finance Commission which shall consist of a Chairman and four other members to be appointed by the President.

Finance Commission.

(2) Parliament may by law determine the qualifications which shall be requisite for appointment as members of the Commission and the manner in which they shall be selected.

(3) It shall be the duty of the Commission to make recommendations to the President as to—

(*a*) the distribution between the Union and the States of the net proceeds of taxes which are to be, or may be, divided between them under this Chapter and the allocation between the States of the respective shares of such proceeds ;

(*b*) the principles which should govern the grants-in-aid of the revenues of the States out of the Consolidated Fund of India ;

(*c*) the continuance or modification of the terms of any agreement entered into by the Government of India with the Government of any State specified in Part B of the First Schedule under clause (1) of Article 278 or under Article 306 ; and

(*d*) any other matter referred to the Commission by the President in the interests of sound finance.

(4) The Commission shall determine their procedure and shall have such powers in the performance of their functions as Parliament may by law confer on them.

Recommendations of the Finance Commission.

281. The President shall cause every recommendation made by the Finance Commission under the provisions of this Constitution together with an explanatory memorandum as to the action taken thereon to be laid before each House of Parliament.

Miscellaneous Financial Provisions

Expenditure defrayable by the Union or a State out of its revenues.

282. The Union or a State may make any grants for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislature of the State, as the case may be, may make laws.

Custody, etc., of Consolidated Funds, Contingency Funds and moneys credited to the public accounts.

283. (1) The custody of the Consolidated Fund of India and the Contingency Fund of India, the payment of moneys into such Funds, the withdrawal of moneys therefrom, the custody of public moneys other than those credited to such Funds received by or on behalf of the Government of India, their payment into the public account of India and the withdrawal of moneys from such account and all other matters connected with or ancillary to matters aforesaid shall be regulated by law made by Parliament, and, until provision in that behalf is so made, shall be regulated by rules made by the President.

(2) The custody of the Consolidated Fund of a State and the Contingency Fund of a State, the payment of moneys into such Funds, the withdrawal of moneys therefrom, the custody of public moneys other than those credited to such funds received by or on behalf of the Government of the State, their payment into the public account of the State and the withdrawal of moneys from such account and all other matters connected with or ancillary to matters aforesaid shall be regulated by law made by the Legislature of the State, and, until provision in that behalf is so made, shall be regulated by rules made by the Governor or Rajpramukh of the State..

Custody of suitors' deposits and other moneys received by public servants and Courts.

284. All moneys received by or deposited with —

(a) any officer employed in connection with the affairs of the Union or of a State in his capacity as such, other than revenues or public moneys raised or received by the Government of India or the Government of the State, as the case may be or

(b) any Court within the territory of India to the credit of any cause, matter, account or persons, shall be paid into the public account of India or the public account of the State, as the case may be.

Exemption of property of the Union from State taxation.

285. (1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State.

(2) Nothing in clause (1), shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State.

Restrictions as to imposition of tax on the sale or purchase of goods.

286. (1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place —

(*a*) outside the State; or

(*b*) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Explanation. — For the purposes of sub-clause (*a*), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce :

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951.

(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent.

Exemption from taxes on electricity.

287. Save in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the consumption or sale of electricity (whether produced by a Government or other persons) which is—

(*a*) consumed by the Government of India, or sold to the Government of India for consumption by that Government; or

(*b*) consumed in the construction, maintenance or operation of any railway by the Government of India or a railway company operating that railway, or sold to that Government or any such railway company for consumption in the construction, maintenance or operation of any railway,

and any such law imposing, or authorising the imposition of, a tax on the sale of electricity shall secure that the price of electricity sold to the Government of India for consumption by that Government, or to any such railway company as aforesaid for consumption in the construction, maintenance or operation of any railway, shall be less by the amount of the tax than the price charged to other consumers of a substantial quantity of electricity.

Exemption from taxation by States in respect of water or electricity in certain cases.

288. (1) Save in so far as the President may by order otherwise provide, no law of a State in force immediately before the commencement of this Constitution shall impose, or authorise the imposition of, a tax in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by Parliament for regulating or developing any inter-State river or river-valley.

Explanation.—The expression "law of a State in force" in this clause shall include a law of a State passed or made before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

(2) The Legislature of a State may by law impose, or authorise the imposition of, any such tax as is mentioned in clause (1), but no such law shall have any effect unless it has, after having been reserved for the consideration of the President, received his assent; and if any such law provides for the fixation of the rates and other incidents of such tax by means of rules or orders to be made under the law by any authority, the law shall provide for the previous consent of the President being obtained to the making of any such rule or order.

Exemption of property and income of a State from Union taxation.

289. (1) The property and income of a State shall be exempt from Union taxation.

(2) Nothing in clause (1) shall prevent the Union from imposing, or authorising the imposition of, any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith.

(3) Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by law declare to be incidental to the ordinary functions of government.

Adjustment in respect of certain expenses and pensions.

290. Where under the provisions of this Constitution the expenses of any court or Commission, or the pension payable to or in respect of a person who has served before the commencement of this Constitution under the Crown in India or after such commencement in connection with the affairs of the Union or of a State, are charged on the Consolidated Fund of India or the Consolidated Fund of a State, then, if—

(a) in the case of a charge on the Consolidated Fund of India, the court or Commission serves any of the separate needs of a State, or the person has served wholly or in part in connection with the affairs of a State; or

(b) in the case of a charge on the Consolidated Fund of a State, the court or Commission serves any of the separate needs of the Union or another State, or the person has served wholly or in part in connection with the affairs of the Union or another State,

there shall be charged on and paid out of the Consolidated Fund of the State or, as the case may be, the Consolidated Fund of India or the Consolidated Fund of the other State, such contribution in respect of the expenses or pension as may be agreed, or as may in default of agreement be determined by an arbitrator to be appointed by the Chief Justice of India.

Privy purse sums of Rulers.

291. (1) Where under any covenant or agreement entered into by the Ruler of any Indian State before the commencement of this Constitution, the payment of any sums, free of tax, has been guaranteed or assured by the Government of the Dominion of India to any Ruler of such State as privy purse—

(a) such sums shall be charged on, and paid out of, the Consolidated Fund of India; and

(b) the sums so paid to any Ruler shall be exempt from all taxes on income.

(2) Where the territories of any such Indian State as aforesaid are comprised within a State specified in Part A or Part B of the First Schedule, there shall be charged on, and paid out of, the Consolidated Fund of that State such contribution, if any, in respect of the payments made by the Government of India under clause (1) and for such period as may, subject to any agreement entered into in that behalf under clause (1) of Article 278, be determined by order of the President.

CHAPTER II. — BORROWING

Borrowing by the Government of India.

292. The executive power of the Union extends to borrowing upon the security of the Consolidated Fund of India within such limits, if any, as may from time to time be fixed by Parliament by law and to the giving of guarantees within such limits, if any, as may be so fixed.

Borrowing by States.

293. (1) Subject to the provisions of this article, the executive power of a State extends to borrowing within the territory of India upon the security of the Consolidated Fund of the State within such limits, if any, as may from time to time be fixed by the Legislature of such State by law and to the giving of guarantees within such limits, if any, as may be so fixed.

(2) The Government of India may, subject to such conditions as may be laid down by or under any law made by Parliament, make loans to any State or, so long as any limits fixed under Article 292 are not exceeded, give guarantees in respect of loans raised by any State, and any sums required for the purpose of making such loans shall be charged on the Consolidated Fund of India.

(3) A State may not without the consent of the Government of India raise any loan if there is still outstanding any part of a loan which has been made to the State by the Government of India or by its predecessor Government, or in respect of which a guarantee has been given by the Government of India or by its predecessor Government.

(4) A consent under clause (3) may be granted subject to such conditions, if any, as the Government of India may think fit to impose.

CHAPTER III.—PROPERTY, CONTRACTS, RIGHTS, LIABILITIES, OBLIGATIONS AND SUITS

Succession to property, assets, rights, liabilities and obligations in certain cases.

294. As from the commencement of this Constitution—

(*a*) all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of the Dominion of India and all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of each Governor's Province shall vest respectively in the Union and the corresponding State, and

(*b*) all rights, liabilities and obligations of the Government of the Dominion of India and of the Government of each Governor's Province, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations respectively of the Government of India and the Government of each corresponding State, subject to any adjustment made or to be made by reason of the creation before the commencement of this Constitution of the Dominion of Pakistan or of the Provinces of West Bengal, East Bengal, West Punjab and East Punjab.

Succession to property, assets, rights, liabilities and obligations in other cases.

295. (1) As from the commencement of this Constitution—

(*a*) all property and assets which immediately before such commencement were vested in any Indian State corresponding to a State specified in Part B of the First Schedule shall vest in the Union, if the purposes for which such property and assets were held immediately before such commencement will thereafter be purposes of the Union relating to any of the matters enumerated in the Union List, and

(*b*) all rights, liabilities and obligations of the Government of any Indian State corresponding to a State specified in Part B of the First Schedule, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations of the Government of India, if the purposes for which such rights were acquired or liabilities or obligations were incurred before such commencement will thereafter be purposes of the Government of India relating to any of the matters enumerated in the Union List,

subject to any agreement entered into in that behalf by the Government of India with the Government of that State.

(2) Subject as aforesaid, the Government of each State specified in Part B of the First Schedule shall, as from the commencement of this Constitution, be the successor of the Government of the corresponding Indian State as regards all property and assets and all rights, liabilities and obligations, whether arising out of any contract or otherwise, other than those referred to in clause (1).

Property accruing by escheat or lapse or as *bona vacantia*.

296. Subject as hereinafter provided, any property in the territory of India which, if this Constitution had not come into operation, would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as *bona vacantia* for want of a rightful owner, shall, if it is property situate in a State, vest in such State, and shall, in any other case, vest in the Union:

Provided that any property which at the date when it would have so accrued to His Majesty or to the Ruler of an Indian State was in the possession or under the control of the Government of India or the Government of a State shall, according as the purposes for which it was then used or held were purposes of the Union or of a State, vest in the Union or in that State.

Explanation. — In this article, the expressions "Ruler" and "Indian State" have the same meanings as in Article 363.

297. All lands, minerals and other things of value underlying the ocean within the territorial waters of India shall vest in the Union and be held for the purposes of the Union.

Things of value lying within territorial waters to vest in the Union.

298. (1) The executive power of the Union and of each State shall extend, subject to any law made by the appropriate Legislature, to the grant, sale, disposition or mortgage of any property held for the purposes of the Union or of such State, as the case may be, and to the purchase or acquisition of property for those purposes respectively, and to the making of contracts.

Power to acquire property.

(2) All property acquired for the purposes of the Union or of a State shall vest in the Union or in such State, as the case may be.

299. (1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor or the Rajpramukh of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor or the Rajpramukh by such persons and in such manner as he may direct or authorise.

Contracts.

(2) Neither the President nor the Governor nor the Rajpramukh shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

300. (1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.

Suits and Proceedings.

(2) If at the commencement of this Constitution—

(*a*) any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and

(*b*) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings.

"For the student of constitutional law nothing would suffice but a thorough-going analysis of many decisions and an impressionistic treatment would be but vexation."

(Charles Evans Hughes, Chief Justice of the Supreme Court of America.)

" A thorough-going analysis of many decisions" —This is what you will find in this book.

"Such merit as the present work may possess must, then, consist in its systematic arrangement, and in the fact that, with reference to the constitutional principles which are discussed, it fully sets forth the processes of judicial reasoning by which they have been established, it suggests the corollaries which may be drawn from them, and it indicates the relations which they bear to one another and to the more general doctrines of American public law.

Whenever space has seemed to permit, the author has reproduced the language of the Federal Supreme Court. This has necessitated many, and, at times, extended quotations. It is believed, however, that this practice will commend itself to the reader. Since the character of this work requires in any case that the arguments should be given, the authoritative language of the nation's highest tribunal is certainly preferable to a statement by a commentator of his understanding of the Court's ruling or reasoning."

(From the Preface to the First Edition of Willoughby's Constitutional Law of the United States).

It may modestly be claimed that the above passage fairly represents the lines on which this book also has been prepared.

THE
CONSTITUTION OF INDIA

Volume III.

PART XI

RELATIONS BETWEEN THE UNION AND THE STATES

CHAPTER I.

LEGISLATIVE RELATIONS.

Distribution of Legislative Powers.

Extent of laws made by Parliament and by the Legislatures of States.

245. (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

GOVERNMENT OF INDIA ACT, 1935

"*Distribution of Powers.*

99. *(1)* Subject to the provisions of this Act, the Federal Legislature may make laws for the whole or any part of British India or for any Federated State, and a Provincial Legislature may make laws for the Province or for any part thereof.

(2) Without prejudice to the generality of the powers conferred by the preceding sub-section, no Federal law shall, on the ground that it would have extra-territorial operation, be deemed to be invalid in so far as it applies —

(a) to British subjects and servants of the Crown in any part of India; or

(*b*) to British subjects who are domiciled in any part of India wherever they may be; or

(*c*) to, or to persons on, ships or aircraft registered in British India or any Federated State wherever they may be; or

(*d*) in the case of a law with respect to a matter accepted in the Instrument of Accession of a Federated State as a matter with respect to which the Federal Legislature may make laws for that State, to subjects of that State wherever they may be; or

(*e*) in the case of a law for the regulation or discipline of a naval, military, or air force raised in British India, to members of, and persons attached to, employed with or following, that force, wherever they may be."

JAMMU AND KASHMIR

Part XI of the Constitution applies to the State of Jammu and Kashmir with certain exceptions and modifications—See Art. 370 (1) read with the Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

These exceptions and modifications are indicated under the respective articles under the heading "Jammu and Kashmir."

COGNATE PROVISIONS.

Amendment seeking to make any change in Ch. I of Part XI—Procedure for such amendment—See Art. 368.

Synopsis

1. Scope of the article.
2. Retrospective effect.
3. Sovereignty of the Legislature.
4. Theory of separation of powers.
5. The Legislature and the Executive.
6. The Legislature and the Judiciary.
7. The Executive and the Judiciary.
8. Delegation of power by Legislature—General.
    - (a) Delegation, an unavoidable necessity in all modern States.
    - (b) Limits to delegation of legislative power: British and American theories.
    - (c) British theory.
    - (d) American theory.
    - (e) Difference between American and British theories summed up.
    - (f) Position under the Indian Constitution: Legislature has no plenary power of delegation.
    - (g) Permissible limits of delegation.
    - (h) Importance of the *Delhi Laws Act case*.
    - (i) Propositions deducible from matters actually decided by the *Delhi Laws Act case*.
    - (j) Reasoning in the *Delhi Laws Act case*—Principle deducible from—Essential legislative power cannot be delegated.
    - (k) Conditional and subsidiary legislation.
    - (l) Different conclusions on similar reasoning.
    - (m) Effect of *Delhi Laws Act case* summed up.

- (n) Difficulty of defining principles precisely is no reason for denying their existence.
- (o) Certain admitted limitations on power of legislative delegation.
- (p) Power to enact specific kind of legislation cannot be delegated.
- (q) Express provision in Constitution permitting delegation.
- (r) Conferment of administrative authority.
- (s) Sub-delegation of power.
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9. Essential legislative power cannot be delegated: Principles.
   - (a) General principle established by Supreme Court decisions.
   - (b) Principle explained.
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   - (d) Theory of separation of powers.
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   - (k) Essential and subsidiary matters—No satisfactory tests of distinction.
   - (l) Duty of Court in applying principles.
   - (m) Significance of principle settled by *Delhi Laws Act case*: Check on excessive growth of executive power.
   - (n) Some examples of delegated legislation.
   - (o) Power to repeal existing law.
   - (p) Power to create offences.
   - (q) Power of taxation.
   - (r) Power to constitute Courts and Tribunals.

10. Conditional legislation.
    - (a) General.

      Illustrations.
    - (aa) *State of Bombay* v. *Narottam Das.*
    - (b) *Emperor* v. *Benoarilal.*
    - (c) Power of State Government to refer cases to Special Court for trial.
    - (d) Power to add new items to those specifically mentioned.
    - (e) Power to exempt from provisions of an Act.
    - (f) Power to vary or substitute conditions of licence.
    - (g) Power to extend duration of Act.
    - (h) The power to terminate the operation of an Act.
    - (i) Other illustrative cases.

11. Subordinate or ancillary legislation.

12. Retrospective laws.

12a. Validating laws — See under Note 6.

13. "Subject to the provisions of this Constitution."

14. "Law."

15. Territorial extent of legislative power.
    - (a) Extra-territorial laws.
    - (b) State Legislatures.
    - (bb) Principle of sufficient territorial nexus and taxation power of a State — See Note 6 on Art. 286.
    - (c) Some general presumptions as to extra-territoriality.
    - (d) Territorial waters.

16. Constitutional validity of statutes—General principles.

1. Scope of the article.—Part XI of the Constitution, dealing with the relations between the Union and the States, contains two chapters. The first chapter (ARTS. 245-255) deals with the legislative relations and the second chapter (Arts. 256-263) deals with the administrative relations. This article defines the territorial limits of the legislative powers of the Indian Parliament and State Legislatures respectively. Article 246 relates to the distribution of legislative powers between the Union Parliament and State Legislatures with regard to the matters as to which they are respectively entitled to make laws. These two articles correspond to Ss. 99 and 100 of the Government of India Act, 1935.

2. Retrospective effect.—The validity of Acts passed prior to the Constitution must be determined with reference to the provisions then in force and provisions of this article or Art. 246 have no bearing on the question.[1]

3. Sovereignty of the Legislature. — It has been seen in Part III—General that our Constitution-makers have not adopted the British principle of supremacy of the Parliament, according to which the British Parliament is an omnipotent body, the validity of whose enactments is not open to question in any Court of law. (See Part III—General, Notes 5 and 6.) In other words, the Indian

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Article 245 — Note 2

[1] 1951 Nag 58 (Pr 152) [AIR V 38 C 20] : I L R (1951) Nag 646 : 52 Cri L Jour 1140 (FB), *Sheoshankar* v. *M. P. State Govt.* (The C. P. & Berar Prohibition Act was passed in the year 1938 and its validity will have to be determined by reference to the relevant provisions of the Govt. of India Act, 1935, and not with reference to Arts. 245 and 246 read with the entries in the Legislative Lists in the Constitution.)

1954 Hyd 227 (228, 229) (Pr 2)[AIR V 41 C 5] : ILR (1954) Hyd 783 (DB), *Sarwarlal* v. *State of Hyderabad.* (The Constitution cannot be interpreted retrospectively, and any enactment inconsistent with its provisions is not void in the sense that it never existed. Art. 246 of the Constitution should be similarly construed. The two Hyderabad Regulations 25 and 69 of 1359-F, having been passed before the inauguration of the Constitution, any decision on the unconstitutionality of their provisions, which is given after 26th January, 1950, should guard against the Constitution of India being given retrospective effect. Case-law relied on.)

1951 All 816 (817) (Pr. 7) [A I R V 38 C 199] : I L R (1952) 1 All 862 : 52 Cri L Jour 1474 (DB), *Sagar Mal* v. *The State.* (Distribution of powers under Art. 246 is prospective and not retrospective. The words "subject to the other provisions of this Constitution", in Art. 372, do not mean that laws which had been passed by the Central Legislature before the 26th January, 1950, automatically cease to have effect because the subject has now been made a State subject. The Essential Supplies (Temporary Powers) Act, 1946 which is a Central Act passed before the commencement of the Constitution does not therefore, cease to be in force on the 26th January 1950 because the subject it deals with has been made a 'State' subject.)

[*See also* 1951 Nag 317 (319) (Pr. 9) [A I R V 38 C 95] : I L R (1950) Nag 898, *Thakurdas* v. *Motibhai.* (Sections 74, 100 and 107 of the Govt. of India Act, 1935, have no application to enactments passed by Provincial Legislatures before the coming into force of the Government of India Act. The C. P. and Berar Religious and Charitable Trusts Act is not ultra vires the powers of the Provincial Legislature.)]

Legislature is not a "sovereign body" in the sense in which the British Parliament is a "sovereign body"[1]. The "non-sovereign" character of the Legislatures in India is the result not only of the enactment of Fundamental Rights in the Constitution and the provisions of ART. 13, but of the very fact that the Indian Legislature, unlike the British Parliament, derives its power from a *written* Constitution and hence, every enactment that it passes is liable to be tested from the point of view of its conformity to the provisions of the Constitution. As observed by Mahajan, J., (as he then was) in *In re the Delhi Laws Act, 1912*,[2] "the doctrine of *ultra vires* has no roots whatever in a country where the doctrine of supremacy of Parliament holds the field. The sovereignty of Parliament is an idea fundamentally inconsistent with the notions which govern inflexible and rigid constitutions existing in countries which have adopted any scheme of representative Government."

In this connection, attention may be drawn to the opening words of ART. 245 "subject to the provisions of this Constitution," which govern the law-making powers of both the Parliament and State Legislatures. In contrast with this, the powers of the British Parliament are not subject to any limitations whatsoever. As instances of the constitutional provisions limiting the powers of the Indian Legislature may be mentioned the Fundamental Rights enacted in PART III of the Constitution and the allocation of subjects of legislation to the Union and the State Legislatures under ART. 246 read with the Legislative Lists in the Seventh Schedule. Not only are there no Fundamental Rights under the English Constitution (See PART III—GENERAL, NOTE 5), but the British Parliament is entitled to enact laws on any subject whatsoever.

It must also be mentioned that the British Parliament is not a purely legislative body, but is also a constituent body,[3] and can pass laws affecting the Constitution with the same ease as it can pass ordinary laws. But the Indian Legislatures are, normally, purely legislative bodies. The Constitution, no doubt, provides a machinery for the amendment of the Constitution. But a law making such

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Article 245—Note 3

[1] 1950 Orissa 157 (166) (Pr 22) [AIR V 37 C 26] : I L R (1950) Cut 222 : 51 Cri L Jour 1189 (FB), *Prahalad Jena* v. *State*.
[*See* 1951 S C 332 (371, 372, 401) [AIR V 38 C 56] : 1951 S C R 747 (889, 985) (SC), *In re Delhi Laws Act, 1912*. (Per *Mahajan and Mukherjea, JJ.*— The constitutional position in India approximates more closely to the American model than to the English model — Varadachariar J.'s view in *Benoari Lal Sarma's* case, AIR 1943 F C 36 (FC) approved.)]

[2] 1951 S C 332 (371) [AIR V 38 C 56] : 1951 S C R 747 (888) (SC).

[3] 1951 S C 332 (371, 372, 396) [A I R V 38 C 56] : 1951 S C R 747 (889, 969) (SC), *In re Delhi Laws Act, 1912*.

amendment cannot (subject to certain exceptions) be passed in the same way as ordinary laws but requires special procedure—see ART. 368. In this connection, reference may be made to Dicey's LAW OF THE CONSTITUTION where he points out the characteristics of non-sovereign legislative bodies. Among these, he emphasizes the point that a non-sovereign legislative body (like the Pre-Constitution Indian Legislature constituted under the Acts of the Imperial Parliament,) had no power to make any law altering the provisions of the Act under which it was constituted.[4]

With regard to the sovereign character of the British Parliament, the following passage from the judgment of Kania, C. J., in *the Delhi Laws Act case*[5] may be quoted :

> "Under the English Constitution the British Parliament with its legislative authority in the King and the two Houses of Parliament is supreme and its sovereignty cannot be challenged anywhere. It has no written Charter to define or limit its power and authority. Its powers are a result of convention but are now recognised as completely absolute, uncontrolled and unfettered. Sir Cecil Carr in his book on ENGLISH ADMINISTRATIVE LAW at page 15 observes :
>
> > 'A more basic difference between the Constitutions of the United States and Britain is the notorious fact that Britain has no written Constitution, no fundamental statute which serves as a touchstone for all other legislation and which cannot be altered save by some *specially solemn and dilatory process.* In Britain the King in Parliament is all powerful. There is no Act which cannot be passed and will not be valid within the ordinary limits of judicial interpretation . . . . Even Magna Carta is not inviolate . . . . The efficient secret of the English Constitution was the close union and nearly complete fusion of the executive and legislative powers. In other words by the system of Cabinet Government the executive authority is entrusted to a committee consisting of members of the dominant party in the Legislature and in the country.'
>
> "In Halsbury's LAWS OF ENGLAND, VOL. VI, ART. 429, it is further stated that it is for this reason that there is no law which the King in Parliament cannot make or unmake whether relating to the Constitution itself or otherwise ; there is no necessity as in States whose Constitutions are drawn up in a fixed and rigid form

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[4] Introduction to the Study of the Law of the Constitution by A. V. Dicey, 9th Edition, pages 99-100.
[*See also* 1951 S C 332 (336, 353) [A I R V 38 C 56] : 1951 S C R 747 (760, 761, 821, 822) (SC), *In re Delhi Laws Act, 1912.*]

[5] 1951 S C 332 (335) [AIR V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

and contained in written documents for the existence of a judicial body to determine whether any particular legislative Act is within the constitutional powers of Parliament or not; and laws affecting the Constitution itself may be enacted with the same ease and subject to the same procedure as ordinary laws."

It will be seen that the characteristics of the supremacy of the British Parliament mentioned in the above passage are lacking in Legislatures under the Indian Constitution. To that extent, therefore, as already stated, they cannot be said to be sovereign bodies like the British Parliament.

But within the limits imposed by the Constitution, the Indian Legislature has plenary powers of legislation. It was held even with reference to the Indian and Colonial Legislatures functioning under Acts of the Imperial Parliament that such Legislatures were not mere delegates or agents of the Imperial Parliament but had in their own allotted fields, plenary powers of legislation, of the same nature and extent as those of the Imperial Parliament.[6] The position of the Legislature under the Indian Constitution is in no way inferior to that of the pre-Constitution Indian Legislature or the Colonial Legislatures in this respect. In fact, as Fazl Ali, J., put it in *In re Delhi Laws Act, 1912*,[7] "Our present Parliament, though it may not be as sovereign as the Parliament of Great Britain, is certainly as sovereign as the Congress of the United States of America and the Legislatures of other independent countries having a federal constitution." Thus, when it is said that the Indian Parliament and State Legislatures are not sovereign bodies, it is only meant that they are not sovereign bodies like the British Parliament, and that their powers are limited by the Constitution, and no limitation on the plenary character of the legislative powers of such Legislatures is implied.

As to the bearing of legislative sovereignty on the power of the Legislature to delegate its authority to the executive or administrative or other body, see NOTE 9.

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[6] 1933 P C 16 (18) [AIR V 20] (PC), *Croft* v. *Dunphy*.

('78) ILR 4 Cal 172 (180) : 5 Ind App 178 (PC), *Empress.*v. *Burah*.

1954 Bom 261 (268) [AIR V 41 C 76] : I L R (1954) Bom 647 (DB), *Cantonment Board Poona* v. *Western India Theatres Ltd*.

(1892) 1892 App Cas 437 (442): 61 L J P C 75, *Maritime Bank of Canada* v. *New Brunswick*.

(1884) 9 App Cas 117 (132) : 53 L J P C 1, *Hodge* v. *Queen*.

[*See* 1935 PC 158 (163) [A I R V 22] (PC), *British Coal Corporation* v. *King*. (*Held* that S. 91 of the British North America Act, 1867, did, by necessary intendment, invest the Dominion Parliament in cases within its jurisdiction, with the power to regulate or prohibit appeals in Criminal cases to the King in Council with the result that that power was validly exercised by S. 17 of the Criminal Code Amendment Act, 1933, of Canada. *Nadan* v. *The King*, (1926) 1926 App Cas 482, *Explained*.)]

[7] 1951 S C 332 (353) [AIR V 38 C 56] : 1951 S C R 747 (821) (SC).

4. Theory of separation of powers.—Willis in his CONSTITUTIONAL LAW OF THE UNITED STATES[1] defines the doctrine of separation of governmental powers as follows :

> "The doctrine of separation of governmental powers means, theoretically, that there are different departments, or branches of government, acting as agents of the sovereign people; that there are governmental functions corresponding with such branches; and that each one has, as its own, powers possessed by no one of the others, which it cannot delegate to any other branch of the government, which cannot be exercised by any other branch of the government, which it cannot be compelled to exercise by any other department, and of which it cannot be deprived by any other branch of the government; and that it cannot exercise any of the powers of any other branch of government, or deprive such branch of its powers, or compel it to exercise them."

The powers of the Government for this purpose are divided into three classes as legislative, executive and judicial. The Legislature makes, the Executive executes and the Judiciary construes the law.[2]

The doctrine of separation of powers is considered an essential principle underlying the American Constitution.[3] In this connection, the following passage from the judgment of Mukherjea, J., in the *Delhi Laws Act case*[4] may be quoted :

Article 245 — Note 4

[1] Constitutional Law of the United States by Willis, 1936, p. 130.

[2] (1825) 6 Law Ed 253 (263) : 10 Wheat 1, *Wayman* v. *Southard.*

[3] (1881) 26 Law Ed 377 (387) : 13 Otto 168, *Kilbourn* v. *Thompson.* (It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to Governments, whether state or national, are divided into the three grand departments of the executive, the legislative and the judicial. That the functions appropriate to each of these branches of the government shall be vested in a separate body of public servants and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other. To these general propositions there are in the Constitution of the United States some important exceptions.)

(1928) 277 U S 189 (201, 202) : 72 Law Ed 845, *Springer* v. *Philippine Islands.* (The existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of authority of another department emphasises rather than casts doubts upon, the generally inviolate character of this basic rule.)

(1879) 25 Law Ed 496 (501) : 99 U S 700, *Union Pacific Railroad Company* v. *United States.*

[4] 1951 S C 332 (393, 394) [AIR V 38 C 56]: 1951 S C R 747 (962, 963) (SC), *In re Delhi Laws Act, 1912.*

"The modern doctrine of 'separation of powers' was a leading tenet in the political philosophy of the 18th century. It was elaborated by Montesquieu in his "L'esprit des lois" in explanation of the English political doctrine and was adopted, in theory at least, in all its fullness and rigidity by the constitution-makers of America. The Constitution of America provides for the separation of the governmental powers into three basic divisions—the executive, the legislative, and the judicial—and the powers appertaining to each department have been vested in a separate body of public servants. It is considered to be an essential principle underlying the constitution that powers entrusted to one department should be exercised exclusively by that department without encroaching upon the powers confided to others. As is said by Cooley: 'The different classes of power have been apportioned to different departments; and as all derive their authority from the same instrument, there is an implied exclusion of each department from exercising the functions conferred upon the others'."

The following passage from the judgment of Fazl Ali, J., in the same case[5] is also worth quoting as bringing out the meaning and purpose of the doctrine and how it came to be considered an essential principle of the American Constitution :

"The second principle on which reliance was placed was said to be founded on the well-known doctrine of 'separation of powers'. It is an old doctrine which is said to have originated from Aristotle but, as is well known, it was given great prominence by Locke and Montesquieu. The doctrine may be stated in Montesquieu's own words :

> 'In every government there are three sorts of power : the legislative ; the executive in respect to things dependent on the law of nations ; and the executive in regard to matters that depend on the civil law . . . When the legislative and the executive powers are united in the same person, or in the same body of magistrates, there can be no liberty ; because apprehensions may rise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again there is no liberty, if the judiciary power be not separated from the legislative and the executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There should be an end of everything, were the same man or the same body, whether of the nobles or

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[5] 1951 S C 332 (350) (Pr 58) [A I R V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

> of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.' Montesquieu's SPIRIT OF LAWS, VOL. 1, by J. V. Pritchard, 1914, Edn. pp. 162-3.

" The doctrine found many enthusiasts in America and was virtually elevated to a legal principle in that country. Washington in his farewell address, said :

> 'The spirit of encroachment tends to consolidate the powers of all governments in one, and thus to create, whatever the form of government, a real despotism.'

John Adams wrote on similar lines as follows:

> 'It is by balancing one of these three powers against the other two that the efforts in human nature towards tyranny can alone be checked and restrained and any degree of freedom preserved.' Vide, WORKS, VOL. I, p. 186.

"These sentiments are fully reflected in the Constitutions of the individual States as well as in the Federal Constitution of America. Massachusetts in her Constitution, adopted in 1780, provided that, 'in the government of this commonwealth the legislative department shall never exercise the executive and judicial powers or either of them : the executive shall never exercise legislative and judicial powers or either of them ; the judicial shall never exercise legislative and executive powers or either of them ; to the end that it may be a government of laws and not of men.' Willoughby's CONSTITUTION OF THE UNITED STATES, Vol. III, 1616.

"The Constitutions of 39 other States were drafted on similar lines, and so far as the Federal Constitution of the United States was concerned, though it does not expressly create a separation of governmental powers, yet from the three Articles stating that the legislative power vests in Congress, the judicial power in the Supreme Court and the executive power in the President, the rule has been deduced that the power vested in each branch of the Government cannot be vested in any other branch, nor can one branch interfere with the power possessed by any other branch. This rule has been stated by Sutherland, J., in *Springer* v. *Government of the Philippine Islands*[6] in these words :

> 'It may be stated then, as a general rule inherent in the American constitutional system, that unless otherwise expressly provided or incidental to the powers conferred, the Legislature cannot exercise either executive or judicial power; the Executive cannot exercise either legislative or judicial power; the Judiciary cannot exercise either executive or legislative power'."

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[6] (1928) 277 U S 189 (201) : 72 Law Ed 845.

Although, as a matter of constitutional theory, the American Constitution is based on the doctrine of separation of powers which requires that each of the three great governmental powers must be exercised only by the particular department concerned and cannot be exercised by or delegated to any other department, it has, as a matter of fact, been very much modified in practice and is far from being a rigid and inelastic principle.[7] In this connection the following passage from CONSTITUTIONAL LAW OF THE UNITED STATES[8] by Professor Willis may be usefully quoted:

> "The doctrine was undoubtedly impliedly written into our Constitution because of the influence of Locke, Montesquieu, and Cromwell's Institute of Government. It is in the spirit of seventeenth-century English history, when the three departments of government in England were fighting for their independence. The President represents a Tudor or Stuart King; Congress represents Parliament; and the courts of the United States, the courts of England. Yet after 1688, England departed from this doctrine and has never returned to it. However, the framers of the Constitution, after copying what they regarded as English practice and Montesquieu's theory, themselves further emasculated the doctrine by their system of checks and balances; and in the remaining history of the United States, the Supreme Court has changed the law of the separation of powers, until now it is very different from what it was when it left the hands of the Fathers. State supreme courts have followed the example of the United States Supreme Court. It is, therefore, an open question whether or not we now have this doctrine at all under United States constitutional law."

Corwin in his THE CONSTITUTION AND WHAT IT MEANS TODAY[9] observes as follows:

> "Articles I, II and III set up the framework of the National Government in accordance with the doctrine of the Separation of Powers of 'the celebrated Montesquieu' which teaches that there are three, and only three, functions of government, the 'legislative,' the 'executive' and the 'judicial,' and that these three functions should be exercised by distinct bodies of men in order to prevent an undue concentration of power. Latterly the importance of this doctrine as a working principle of government under the Constitution has been much diminished by the growth of Presidential leadership in legislation, by the increasing resort by Congress to the practice of delegating what amounts to legislative power to

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[7] 1951 S C 332 (393, 394) [A I R V 38 C 56] : 1951 S C R 747 (963) (SC), *In re Delhi Laws Act, 1912.*

[8] Willis, Constitutional Law of the United States, 1936 Ed, page 135.

[9] "The Constitution and What it Means Today" 11th Edition 1954 P. 2.

the President and other administrative agencies, and by the mergence in the latter of all three powers of government according to earlier definitions thereof."

In *Hampton J. R. and Co.* v. *United States*[10] Taft, C. J., observed as follows :

> "It is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch."

So also, in Story's CONSTITUTION[11] the following passage occurs:

> "But when we speak of a separation of the three great departments of Government and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of free constitution."

It has been seen above that the federal constitution of the United States does not expressly create a separation of governmental powers and that the principle of separation is only an implied principle which has been deduced by the Courts and jurists from the articles of the constitution stating that the legislative power vests in the Congress, the judicial power in the Supreme Court and the executive power in the President. The Australian constitution (the Commonwealth of Australia Constitution Act, 1900 (63 & 64; Vict., ch. 12), Sections 1, 61 and 71) is similar to the Federal constitution of America in this respect. But the Canadian constitution (the British North America Act, 1867 (30 & 31 Vict., Ch. 3), S. 9) only provides that the *executive* Government is vested in the Queen, and does not contain corresponding provisions as to the vesting of legislative and judicial powers.

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[10] (1928) 72 Law Ed 624 (629) : 276 U S 394 (406).

[11] Story's Constitution, S. 525—Quotation taken from judgment of Mukherjea, J., in *In re Delhi Laws Act, 1912*, 1951 S C R 747 at pp. 963-964: AIR 1951 S C 332 (SC).

The Indian Constitution is like the Canadian Constitution in this respect. Under Art. 53, it is provided that the executive power of the Union shall be vested in the President and under Art. 154 it is provided that the executive power of the State shall be vested in the Governor. There are no corresponding provisions as regards the vesting of the legislative and judicial powers. Further, the Constitution has adopted the principle of ministerial responsibility and has thus adopted the British system of Parliamentary executive as opposed to the Presidential system which is in vogue in America. The adoption of the principle of ministerial responsibility to the Legislature means necessarily the fusion of the executive and the legislative organs, and the rejection of the theory of separation of powers of the American Constitution.[12] In *In re the Delhi Laws Act, 1912*,[13] Mukherjea, J., observed as follows :

> "It does not admit of any serious dispute that the doctrine of separation of powers has, strictly speaking, no place in the system of Government that India has at the present day under her own Constitution or which she had during the British rule. Unlike the American and Australian Constitutions, the Indian Constitution does not expressly vest the different sets of powers in the different organs of the State. Under Art. 53, cl. (1), the executive power is indeed vested in the President, but there is no similar vesting provision regarding the legislative and the judicial powers. Our Constitution, though federal in its structure, is modelled on the British Parliamentary system, the essential feature of which is the responsibility of the Executive to the Legislature. The President, as the head of the Executive, is to act on the advice of the Council of Ministers, and this Council of Ministers, like the British cabinet, is a 'hyphen which joins, a buckle which fastens, the legislative part of the State to the executive part'."

Although the Constitution has not adopted the principle of separation of powers, the scheme of the Constitution is clearly that there must be three departments of the Government primarily responsible for the discharge of the three main divisions of governmental power.[14]

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[12] 1951 S C 332 (394, 395) [A I R V 38 C 56] : 1951 S C R 747 (965, 966) (S C), *In re Delhi Laws Act, 1912.*

1951 All 257 (307) [AIR V 38 C 51] : ILR (1951) 1 All 269 (FB), *Motilal* v. *Uttar Pradesh Govt.*

1955 Pat 1 (31) (Pr 21) [(S) AIR V 42 C 1] : ILR 33 Pat 690 (SB), *Brij Bhukan* v. *S. D. O. Siwan.* ("The Articles of our Constitution do not divide and establish areas of black and white"—These observations of Ramaswami J. in A I R 1952 Pat 194 adopted—Observations of Lakshmikant Jha C. J. in AIR 1952 Pat 166 suggesting that the American doctrine of separation of powers has been adopted in our Constitution held to be wrong.)

[13] 1951 S C 332 (394, 395) [AIR V 38 C 56] : 1951 S C R 747 (965, 966) (SC).

See also Art. 50, Note 1 (Separation of Judiciary and Executive); Art. 53, Note 6 (Meaning of executive power); Art. 226, Note 162 (Meaning of judicial power). As to delegation of power by Legislature to the Executive, see Notes 8, 9, 10 and 11.

5. The Legislature and the Executive. — The meaning of executive power has been considered in Note 6 on Art. 53. It has been there pointed out that the executive power of the Government is not confined to carrying out the laws passed by the Legislature but that it includes in addition the general power of administering public affairs and that executive power would cover the residue of governmental power not assigned specifically to other bodies and organs of Government. This view finds support from the views of a writer in the Yale Law Journal, cited by Prof. Willis in his Constitutional Law of the United States. Referring to the views of the above writer, Prof. Willis[1] says: "He finds difficulty in defining executive power except as including all governmental power which is not a part of the process of legislation or adjudication, that is, the power which is concerned mostly with the management and execution of public affairs." In the same paragraph, Prof. Willis observes: "The executive function is the function of administering public affairs and enforcing or carrying out the law." The same view has also been expressed by the Supreme Court.[1a]

In spite of this broad connotation of the executive power, the term 'executive' refers primarily to that branch of the Government which puts the laws into execution as distinguished from the legislative or judicial branches. The body that deliberates and enacts laws is legislative; the body that judges and applies the law in particular cases is judicial; and the body that carries the law into effect or superintends the enforcement of them is executive.[2]

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[14] 1955 S C 549 (556) [(S) AIR V 42 C 84] : 1955-2 S C R 225 (SC), *Ram Jawaya* v. *State of Punjab*. ("The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption by one organ or part of the State, of functions that essentially belong to another.")

[*See* 1951 S C 332 (346, 347) [A I R V 38 C 56]: 1951 S C R 747 (796, 798) (S C), *In re Delhi Laws Act, 1912*.]

Article 245 — Note 5

[1] Constitutional Law of the United States by Prof. Willis, 1936 Edition, p. 131.

[1a] 1955 S C 549 (555) [(S) AIR V 42 C 84]: 1952-2 S C R 225 (SC), *Ram Jawaya* v. *State of Punjab*. (It may not be possible to frame an exhaustive definition of what executive function means. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away.)

[2] Wharton's Law Lexicon, 14th Edition, p. 388.

Thus, the position of the Executive under the Constitution is one of subordination to the Legislature. In fact, the legislative power is, in a certain sense, the supreme power in the State. On this point, Leacock[3] observes as follows in his ELEMENTS OF POLITICAL SCIENCE:

> "In a certain sense, inasmuch as the making of the law is logically antecedent to its execution and to decisions as to its meanings, the legislative power is the chief power of Government. 'The legislative power,' says Judge Story in his Commentaries on the Constitution, 'is the great and overruling power in every free Government.' Looked at in a purely theoretic light, the executive function of the Government (the carrying out of the law) appears in a quite mechanical and secondary aspect."

The imposition of penalties for violation of law, that is the creation of an offence, is a legislative and not an executive or judicial function.[4]

The legislative power does not include the power to make appointment of officers for the purpose of enforcing the law, which is an executive power.[5]

See also ART. 53, NOTE 4.

6. The Legislature and the Judiciary. —'Legislative power' has been defined as power to create rights, powers, privileges, or immunities and their correlatives, as well as status, not dependent upon any previous rights, duties, etc., (or for the first time), that is, apparently the power of creating antecedent legal capacities and liabilities. 'Judicial power' has been defined as the power to create some right or duty dependent upon a previous right or duty, that is, apparently, power to create remedial legal capacities and liabilities.[1] Prof. Willis

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[3] Leacock's Elements of Political Science, 1921 Edition, pages 135, 136.

[4] (1944) 88 Law Edn. 1350 (1354) : 322 U S 398 (404), *Steuart & Bros.* v. *Bowles.*

(1892) 36 Law Edn. 591 (594) : 144 U S 677 (687), *United States* v. *Eaton.* (It is necessary that a sufficient statutory authority should exist for declaring an act or omission a criminal offence.)

[See however (1883) 9 App Cas 117 (132) : 53 L J P C 1, *Hodge* v. *The Queen.* (Local Legislature has power under British North America Act, 1867 to entrust to Board of Commissioners to enact regulations in nature of police or municipal regulations of a merely local character for the good government of taverns, etc., and thereby to create offences and annex penalties thereto.)]

[5] (1928) 277 U S 189 (202): 72 Law Edn. 845, *Springer* v. *Philippine Islands.* (The appointment of managers of Government property or business is essentially an executive act which the Legislature is without capacity to perform directly or through any of its members.)

Article 245 — Note 6

[1] Constitutional Law of the United States by Willis, 1936, p. 131.

[*See also* 69 Com W L R 183 (211), *Rola Co. (Australia) Proprietary Ltd.* v. *Commonwealth.* (*Starke J.*—The true function of judicial power is, to investiin his CONSTITUTIONAL LAW OF THE UNITED STATES[2] observes as follows :

> "The creation of remedial rights generally is a function legislative in nature as much as the creation of antecedent rights. In fact, without remedial rights there would be no antecedent rights. Perhaps, it would be better to say that it is a legislative function to make all substantive law and a judicial function finally to determine constitutional jurisdiction and the application of substantive law to specific facts. Fact-finding bulks large in the judicial function. It includes more than drawing syllogistic conclusions. The legislative function then is general and relates to the future, whereas the judicial function is specific, final and ordinarily relates to the past."

Thus, to declare what the law is or has been is a judicial power. To declare what the law shall be is a legislative power.[3] In other words, it is the province of the Judiciary only to expound the law as it is and not to speculate upon what is best for the community which is the function purely of the Legislature.[4]

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gate, declare and enforce rights and obligations on present or past facts, by whatever authority such facts are ascertained or determined, and under laws supposed already to exist—Reference taken from AIR 1955 Hyd 257 (259).]

[2] Constitutional Law of the United States by Willis, 1936, p. 131.

[3] 1944 F C 86 (90) [A I R V 31] (F C), *Basanta Chandra* v. *Emperor*. (Per *Spens C. J.*—The distinction between a 'legislative' act and a 'judicial' act is well-known, though in particular instances it might not be easy to say whether an act should be held to fall in one category or the other. The Legislature is only authorised to enact laws—Direction that a proceeding pending in Court is discharged is judicial and not a legislative act.)

(1804) 2 Law Edn. 276 (278) : 2 Cranch 272 (277), *Ogden* v. *Blackledge*.

[4] (1902) 1902 App Cas 484 (496) : 71 L J K B 857, *Janson* v. *Driefontein Consolidated Mines, Ltd.*

(1908) 53 Law Edn. 150 (158) : 211 U S 210 (226), *Prentis* v. *Atlantic Coast Line Co.*

(1894) 38 Law Edn. 488 (489) : 152 U S 384, *United States* v. *Alger*.

(1816) 4 Law Edn. 579 (605) : 4 Wheat 316, *M'Culloch* v. *The State of Maryland*. (Where the law is not prohibited and is really calculated to effect any of the objects entrusted to the Govt., for the Court to undertake to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department and to tread on legislative ground.)

(1815) 3 Law Edn. 769 (780) : 9 Cranch 388 (422, 423), *The Neriede, Bennett, Master*. (In applying international law, the Court is not concerned with the question whether there should be reciprocation or retaliation for the acts or the policy of a foreign nation with regard to the nationals of the country to which the Court belongs. This question is for the Government. If it decides to reciprocate or retaliate, it can get a law passed for the purpose. And when such a law is passed, the Court will give effect to it. Till then the Court will apply the international law as it is.)

(1804) 2 Law Edn. 276 (278) : 2 Cranch 272 (277), *Ogden* v. *Blackledge*.

Although the Court can hold a statute passed by the Legislature as *ultra vires* its powers under the Constitution, it is not open to a Court in other cases to disregard an enactment of a Legislature even if it be proved that in passing the enactment the Legislature had made a mistake or had been deceived. If a mistake has been committed, the Legislature alone can correct it and the Court cannot sit in judgment on the Legislature as to the wisdom or justice of the legislation.[5] The reasonableness of the law passed by the Legislature can, however, be questioned in a Court in certain cases, where the question is relevant for determining the constitutionality of the statute, as under ART. 19. (See ART. 19, NOTE 20.) See also NOTE 16.

The Court cannot issue any writ or process against the Legislature to prevent it from passing an unconstitutional law.[6]

As stated already, the Legislature is not concerned with the determination or the enforcement of *antecedent* legal rights in individual cases but is only concerned with the *creation* of such rights, generally, to be capable of enforcement in individual cases through Courts hereafter.

[*See* (1869) 19 Law Edn. 482 (488) : 8 Wall 533, *Veazie Bank* v. *Fenno*. (The Judicial cannot prescribe to the legislative department of the Government limitation upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons but the responsibility of the Legislature is not to the Courts but to the people by whom its members are elected. If a particular tax bears heavily upon a Corporation or a class of Corporations, it cannot for that reason only be pronounced contrary to the Constitution.)
(1869) 19 Law Edn. 95 (98) : 7 Wall 433, *The Pacific Insurance Co.* v *Soule*. (Where the power of taxation exercised by Congress is warranted by the Constitution as to mode and subject, it is necessarily unlimited in its nature. Congress may prescribe the basis, fix the rates and require payment as it may deem proper. Within the limits of its constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the Govt.)]
[*See also* (1877) 24 Law Edn. 154 (157) : 94 U S 260, *South Ottawa* v. *Perkins*. (The existence of a law is a judicial question to be decided by the Courts. The doctrine of estoppel is totally inapplicable in such a case. There can be no estoppel in the way of ascertaining the existence of a law. Bonds issued by Municipality without legislative authority are void and Municipality is not estopped from denying the existence of such authority.)]

5. (1893) 1893 App Cas 104 (123) : 62 L J P C 33, *Lebrador Co.* v. *The Queen*. [Compare (1938) 82 Law Edn. 1234 (1242) : 304 U S 144 (153), *United States* v. *Carolene Products Co.* (Where the question of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the Court that these facts have ceased to exist.)]

6. 1951 All 228 (233) (Prs 28, 29) [AIR V 38 C 25] : ILR (1951) 2 All 505 (DB), *Chotey Lal* v. *State of Uttar Pradesh*.

If any enactment disposes of a case by the vigour of the enactment itself without leaving to the judiciary the power to pass appropriate orders with reference to the law in force at the time of the order, it may be open to the objection of judicial functions being usurped by the Legislature.[7] Thus, a direction that a proceeding pending in a Court is discharged is clearly a judicial act and not the enactment of a law and such a direction by the Legislature in an enactment passed by it will be void as it is a direct disposal of cases by the Legislature itself.[8] But where the Legislature enacts a rule of law applicable to certain facts which are to be ascertained by Courts, it would be essentially an exercise of *enacting* power though the new law may vary or reiterate the earlier law. The exercise of such a power would obviously be different from the exercise of judicial power inasmuch as the essential characteristics of a judicial function, namely, adjudication on facts and interpretation of law would be wanting in such a case.[9] In the undermentioned case[10] an Act was impugned on the ground that it *adjudicated* instead of *legislating* but the contention was rejected.

In a civil dispute between two parties, for the Legislature to interfere and pass a law upholding the claim of one of the parties instead of allowing the matter to be decided by a Court of law in due course would be unconstitutional. Such a law would be a violation of ART. 14.[11] (See also ART. 14 NOTES 8 and 27.)

Although the Legislature cannot directly override a judicial decision, it can alter the law as settled or declared by judicial decisions.[12]

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[7] **7.** 1955 Hyd 257 (259) (Pr 6) [(S) AIR V 42 C 75] : ILR (1954) Hyd 766 (DB), *Sarvaiah* v. *Narsing Rao.*

[8] **8.** 1944 F C 86 (90, 91) [AIR V 31] (FC), *Basanta Chandra* v. *Emperor.* (AIR 1944 F C 1 (FC), distinguished.)

[*See* (1899) 43 Law Edn. 1041 (1053) : **174** U S 445 (478), *Stephen* v. *Cherokee Nation.* ("And while it is undoubtedly true that Legislatures cannot set aside the judgments of Courts, compel them to grant new trials, order the discharge of offenders, or direct what steps shall be taken in the progress of a judicial enquiry, the grant of a new remedy by way of review has been often sustained under particular circumstances.")]

[9] **9.** 1955 Hyd **257** (259) (Pr 6) [(S) AIR V 42 C 75] : ILR (1954) Hyd 766 (DB), *Sarvaiah* v. *Narsing Rao.* (AIR 1952 Pat 166, distinguished.)

[10] **10.** 1955 Pat 1 (31) (Pr 21) [(S) A I R V 42 C 1] : I L R 33 Pat 690 (SB), *Brij Bhukan* v. *S. D. O., Siwan.* (Bihar Land Encroachment Act (31 of 1950)—Though there is no scope for judicial determination by the Collector, the Act cannot be declared invalid simply because it is so drafted that instead of giving any judicial discretion to the Collector it finally lays down and indicates the action which has to be taken against the person in possession of public property within the meaning of the Act.)

[11] **11.** 1953 S C 215 (220) [AIR V 40 C 52] : 1953 S C R 1129 : ILR 32 Pat 375 (SC), *Ram Prasad* v. *State of Bihar.* (AIR 1952 Pat 194, Reversed.)

[12] **12.** 1934 P C 45 (49) [AIR V 21] (PC), *Bharat Insurance Co. Ltd.* v. *Income-tax Commissioner, Punjab.*

For examples of decisions superseded by legislation, see the undermentioned cases.[13] In exercise of its legislative power, under the Constitution, a Legislature can retrospectively validate a piece of legislation which has been judicially declared to be unconstitutional.[14] (See

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1955 Pat 1 (32) (Pr 21) [(S) AIR V 42 C 1] : ILR 33 Pat 690 (SB), *Brij Bhukan* v. *S. D. O., Siwan.* (As under the English system, it will be open to the Legislature under our Constitution to override the effect of a judicial decision by legislation provided the legislation does not violate any of the articles of the Constitution and is not in contravention of Fundamental Rights as guaranteed by the Constitution.)

1955 Hyd 257 (258, 259) [(S) A I R V 42 C 75] : I L R (1954) Hyd 766 (DB), *Sarvaiah* v. *Narsing Rao.*

1951 Bom 438 (Pr 3) [AIR V 38 C 99] : ILR (1952) Bom 890 (DB), *Jamnadas Prabhudas* v. *Commr. of Income-tax, Bombay City.* (Article 141 does not mean that the law once declared by the Supreme Court cannot be altered by any competent Legislature.)

1950 Mad 324 (332) (Pr 10) [AIR V 37 C 148] : 51 Cri L Jour 754 (DB), *In re E. P. T. Valyudan.*

1943 Pat 346 (350) [A I R V 30] : 44 Cri L Jour 809 (DB), *Jailal Sahu* v. *Emperor.* (A decision of the Federal Court on a constitutional matter (not being a question of conflict between different Legislatures) having been given on certain premises, no Legislature can enact legislation which will affect the validity of the premises but if the same or similar results can be reached by legislation, the validity of which depends on different premises, the previous decision will be no bar. In other words, a Legislature may, if it can, get round the decision but may not override it.)

[*See also* 1944 F C 1 (8) [AIR V 31] : 45 Cri L Jour 413 (FC), *Piare Dusadh* v. *Emperor.* (Legislature can pass Act validating proceedings of a Court retrospectively.)]

See also Craies on Statute Law, Fifth Edition, 1952, page 57.

[13] (1901) 1901 App Cas 426 (436) : 70 L J K B 905, *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants.* [This decision is superseded by the *Trade Disputes Act, 1906.*)

(1837) 150 E R 1030 (1032, 1033) : 7 L J Ex 42, *Priestley* v. *Fowler.* (This decision was superseded by the *Employers' Liability Act, 1880.*)

[14] 1955 Hyd 257 (258, 259) (Prs 6, 7, 8, 9) [(S) A I R V 42 C 75] : I L R (1954) Hyd 766 (DB), *Sarvaiah* v. *Narsing Rao.* (It is open to the Legislature acting within the sphere of its constitutional authority to pass a validating statute or to give a retrospective effect to a new statute notwithstanding the fact that the earlier law governing the same matter is declared by Courts of law as invalid, unenforceable or inoperative. No doubt, the competency of the Indian Legislature to enact laws does not confer on it the right of a judicial nature. But although investigation of disputes on facts and enforcement of liability on the basis thereof may be purely a judicial function, the Legislature is not precluded by that reason from passing laws which may settle the law for the future or even regulate past disputes by being given a retrospective operation.

The first sub-section of S. 31 of the Hyderabad Houses (Rent, Eviction and Lease) Control Act merely enacts the replacement of an earlier order and the other sub-section does not pronounce on the merits of the cases but merely lays down that the orders and decisions given under the Hyderabad Rent Control Order, 1353-F, shall be deemed to be, as far as possible, orders under the new enactment. The application of the new law to the facts of each case is left to also under ART. 246 NOTE 15.) An alteration by the Legislature of the law as settled by the decisions of the Courts does not raise any inference that those decisions were wrong or even that those who had proposed the alteration were of that opinion.[15] (See also ART. 141 NOTE 6.)

7. The Executive and the Judiciary. — The body that deliberates and enacts laws is legislative; the body that judges and applies the laws in particular cases is judicial, and the body that carries the laws into effect or superintends the enforcement of them is executive.[1] Thus, in a sense and in a purely theoretical light, the executive function of the Government (the carrying out of the law) is a mechanical and secondary one. (See ART. 53, NOTES 4 and 6.) The executive must respect the decisions of the judiciary and can avoid their due operation only by appropriate legislation.[2] In *Rex* v.

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the judicial authorities and the pending proceedings are not decided by the force of the new enactment.

It follows that the argument impugning S. 31 on the ground that it trespasses on the judicial functions of a Court of law is incorrect. The section in substance is an exercise of the incidental power of varying a rule of law and making a new law retrospective and this is a function which the Legislature is competent to perform effectively under Item 18 of List 2 of the 7th Schedule of the Constitution. Hence S. 31 of the Hyderabad Houses (Rent, Eviction and Lease) Control Act of 1954 is not *ultra vires* the legislative powers of the Hyderabad Legislative Assembly :

Held, further that consistently with the view that the enactment of a new rule of law with retrospective effect was a proper exercise of the legislative function and within the competence of the State Legislature, the right to apply in revision under S. 21 rested in the applicants if the orders impugned suffered from the defects referred to in that section.)

('51) 1951 All L Jour 620 (621) (DB), *Ram Niwas* v. *The State of Uttar Pradesh.* (No limitation on the power of a Legislature to enact validating statutes.)

1951 Bom 438 (439) (Pr 4) [A I R V 38 C 99] : I L R (1952) Bom 590 (DB), *Jamnadas Prabhudas* v. *Commissioner of Income-tax, Bombay City.* (Amendment of provisions of Income-tax Act which was contrary to decision of Supreme Court was upheld and it was held that Art. 141 did not mean that the law once declared by the Supreme Court could not be altered by a competent Legislature.)

[*See also* 1946 P C 169 (172) [AIR V 33 C 49] : 47 Cri L Jour 933 (PC), *Kumar Singh Chhajor* v. *Emperor.* (Affirming the view of the Federal Court in A.I.R. 1944 F C 1 (FC), viz., that Ordinance 19 of 1943 was a valid exercise of legislative power which included the power of validation.)

1944 F C 1 (11) [AIR V 31]:45 Cri L Jour 413 (FC), *Piare Dusadh* v. *Emperor.* (*Held*, Ordinance 19 of 1943 was passed in exercise of power of validation which was ancillary to the power to deal with the subject specified in the legislative list.)]

[15] 1934 P C 45 (49) [A I R V 21] (PC), *Bharat Insurance Co. Ltd.* v. *Income Tax Commissioner Punjab.*

Article 245 — Note 7

[1] Wharton's Law Lexicon, 14th Edition, p. 388.

[2] 1953 Mad 41 (47, 48) (Pr 91C) [A I R V 40 C 17] : 1953 Cri L Jour 224 (DB), *In re A. K. Gopalan.*

Speyer,[3] Lord Reading C. J., observed as follows :

> "This is the King's Court; we sit here to administer justice and to interpret the laws of the realm in the King's name. It is respectful and proper to assume that once the law is declared by a competent judicial authority, it will be followed by the Crown."

Again in *Eastern Trust Co.* v. *MaKenzie Mann and Co.,*[4] Sir George Farwell observed :

> "It is the duty of the Crown and of every branch of the executive to abide by and obey the law. If there is any difficulty in ascertaining it, the Courts are open to the Crown to sue, and it is the duty of the executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it."

The Constitution distinctly provides for the maintainability of suits by or against the Government both of the Union and of the States.[5] See ART. 300. Similarly, proceedings under ARTS. 32 and 226 can also be taken against the Government. (See ART. 226, NOTE 27.) But when a matter is in the *absolute discretion* of the executive, the Court cannot interfere and if injustice has been done by the executive, remedy lies with the Legislature.[6] Similarly, Courts have no *political* power, which belongs only to the executive, and Courts cannot decide any political question.[7] Where a question arises into the German Empire, cannot be questioned by the judicial departments in proceedings for a writ of habeas corpus to prevent the extradition of a fugitive from Prussia who is held under extradition proceedings under the Treaty, as the question is a political one and the Court must accept the determination thereof by the political department of the Government.)

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[3] (1916) 1 K B 595 (610) : 85 L J K B 630.

[4] 1915 P C 106 (2) (109) [A I R V 2] (P C). (Where the right to money is *sub judice* and the money is held in medio by the Court the executive Government has no discretion to dispose of such money without the order of the Court and the fact that no procedure analogous to a petition of right exists, in a colony does not authorise the interference by the Crown with private rights, but where a question of legal right is in doubt, the executive Government should apply to the Court to determine the question.)

[5] *See* (1895) 39 Law Ed. 1092 (1100, 1101): 158 U S 564 (583), *Re Debs.* (Right of Government to use force does not preclude right to appeal to Courts for a judicial determination and for the exercise of all their powers of prevention.)

[6] *See* (1900) 44 Law Ed 654 (656) : 177 U S 20, *Quackenbush* v. *United States.* (When through mistake or misapprehension or for any other reason injustice has been done Congress has the power to accord relief, but the Courts cannot of their own motion revise the grounds of action taken in the constitutional exercise of executive power.)

[7] (1912) 56 Law Ed 377 (379) : 223 U S 118 (133), *Pacific States Telephone & Telegraph Company* v. *Oregon.* (Whether or not a State has ceased to be republican in form within the meaning of the guaranty in U. S. Constitution Art. 4, S. 4, because of its adoption of the initiative and referendum is not a judicial question but a political one which is solely for the Congress to determine.)
(1902) 46 Law Ed 534 (545) : 184 U S 270, *Terlinden* v. *Ames.* (The question whether power remains in a foreign state to carry out its treaty obligations is in its nature political and not judicial and the Courts ought not to interfere with the conclusions of the political department in that regard—The existence of the treaty between U. S. and Prussia which has been repeatedly recognised by both the Governments as still in force notwithstanding the incorporation of Prussia

(1901) 45 Law Ed 448 (457) : 180 U S 109 (124), *Neely* v. *Henkel*. (It is not competent for the judiciary to make any declaration upon the question of the length of time during which Cuba may be rightfully occupied and controlled by the U. S. in order to effect its pacification — it being the function of the political branch of Government to determine when such occupation and control shall cease and therefore when the troops of U. S. shall be withdrawn from Cuba.)

(1839) 10 Law Ed 226 (228): 13 Peters 415 (420), *Williams* v. *Suffolk Insurance Company*. (Government of U.S.A. foreign Department denying the sovereignty of Buenos Ayres over Falkland Islands — The Court of U. S. A. is bound by this and cannot go behind it—To what sovereignty any island or country belongs is a question which often arises before Courts in the exercise of a maritime jurisdiction and also in actions on policies of insurance—The action of political branches of Governments in a matter that belongs to them is conclusive: *Foster* v. *Neilson*, (1829) 7 Law Ed 415 and *Garcia* v. *Lee*, (1838) 9 Law Ed 1176, Foll.)

(1829) 7 Law Ed 415 (433) : 2 Pet 253 (307), *Foster and Elam* v. *Neilson*. (In a controversy between two nations concerning national boundary, the Courts of either country should only abide by the measures adopted by its own Government.)

[*See* (1946) 90 Law Ed 1432 (1436) : 328 U S 549 (556), *Colegrove* v. *Green*. (Suit questioning validity of division of State into Congressional districtions for election purposes — "To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by Courts because they clearly fall outside the conditions and purposes that circumscribe judicial action . . . . . . The Constitution has left the performance of many duties in our Governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.")

(1907) 51 Law Ed 351 (356) : 204 U S 24 (32), *Wilson* v. *Shaw*. (Subsequent ratification by Congress is a sufficient answer to the contention that the title of the United States to the Panama Canal Zone was not acquired as provided in the Act of June 28, 1902 by treaty with the Republic of Columbia.)

(1890) 34 Law Ed 691 (696) : 137 U S 202 (212), *Jones* v. *United States*. (In U. S. A., who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens and subjects of that government.)

(1827) 6 Law Ed 537 (540) : 12 Wheat 19 (30), *Martin* v. *Mott*. (Authority to decide whether the exigencies contemplated in the Constitution of the U. S, and the Act of Congress in which the President has the authority to call forth the militia to execute the laws of the Union, suppress insurrections and repel invasions, have arisen, is exclusively vested in the President and his decision is conclusive upon all other persons.)]

[*See also* (1890) 34 Law Ed 222 (231) : 135 U S 403, *Ex parte Baiz*. (The certificate of the Secretary of State is evidence to prove the diplomatic character of a person accredited as a minister by the government of the U. S.)

as to whether a foreign Government is or is not an independent foreign State, the matter is for the decision of the executive and the Court will act on information supplied by the Government.[8]

(a) Delegation, an unavoidable necessity in all modern States.

8. Delegation of power by Legislature — General.— One of the most important questions that have arisen with respect to the powers of the Legislature relates to the delegation of power by the Legislature. The question in this regard is not whether the Legislature has or has not the power of delegation. It is an established proposition that government in modern States will be impossible without a certain amount of delegation of power by the Legislature. The question is only about the limits within which such delegation can be made.

In *The Delhi Laws Act case*,[1] Mahajan J. (as he then was) observed as follows :

> "It is futile to ask in the year of grace 1951 whether delegated legislation is necessary or not. This kind of legislation is only a special aspect of the problem of administrative discretion. The necessity of delegating rule-making power on the largest scale to administrative authorities is as much a basic fact of modern industrial society as the assumption by the State of certain obligations of social welfare. The problem, however, is how delegated legislation and administrative discretion are confined and controlled so as to comply with the elementary principles of law in a

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(1831) 8 Law Ed 1 (30) : 5 Pet 1 (16), *The Cherokee Nation* v. *The State of Georgia*. (Under Art. 3, S. 2 of the U. S. Constitution, the judicial power of the U. S. which is vested, in the Supreme Court under S. 1, extends *inter alia* to controversies between a State or the citizens thereof and foreign States citizens or subjects.)]

[8] (1924) 1924 App Cas 797 (810) : 41 Tim L R 375, *Duff Development Co.* v. *Govt. of Kelantan.* (A submission by a foreign sovereign to jurisdiction of the Court to be effective must take place when the jurisdiction is invoked and not earlier and when a question of jurisdiction is raised by him there can be no inquiry by the Court into his conduct or actions prior to that date. If a sovereign having agreed to submit to jurisdiction refuses to do so when the question arises, he may indeed be guilty of a breach of his agreement but he does not thereby give actual jurisdiction to the Court.)

(1902) 46 Law Ed. 534 (545) : 184 U S 270 (288), *Terlinden* v. *Ames.* (Question whether power remains in a foreign state to carry out its treaty obligations is in its nature political and not judicial and the Courts ought not to interfere with the conclusions of the political department in that regard.)

(1839) 10 Law Ed. 226 (228) : 13 Pet 415 (420), *Williams* v. *Suffolk Insurance Co.* (When the executive branch of the Government which is charged with foreign relations in its correspondence with a foreign nation assumes a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial dept.)

Article 245 — Note 8

[1] 1951 S C 332 (371) [AIR V 38 C 56]: 1951 S C R 747 (888) (S C), *In re Delhi Laws Act, 1912.*

democratic society. The answer to the problem has to be found within the ambit of the constitution of the country concerned and on the construction that a lawyer or a jurist would place on it with a constructive and not a purely legalistic approach . . . . It was customary for the mother of Parliaments to delegate minor legislative power to subordinate authorities and bodies. Some people took the view that such delegation was wholly unwise and should be dispensed with. Prof. Dicey, however, pointed out that it was futile for Parliament to endeavour to work out details of large legislative changes and that such an endeavour would result in cumbersome and prolix statutes. Blackstone remarked that powers of this kind were essential to the effective conduct of the Government. Constitutional practice grew up gradually as and when the need arose in Parliament, without a logical system, and power was delegated by Parliament for various reasons: because the topic required much detail, or because it was technical, or because of pressure of other demands on parliamentary time."

In the same case, Das J., observed as follows[2] :

"Parliament (British Parliament) being supreme and its power to legislate being unlimited, there is nothing to prevent Parliament from delegating its legislative power to the executive officers or other subordinate bodies. Sir Cecil Carr in his 'Delegated Legislation', quoted in the Report of the Committee on Ministers' Powers, usually referred to as the Donoughmore Committee, said :

> 'The first and by far the smallest part (of legislation) is made by the Crown under what survives of the prerogative. The second and weightiest part is made by the King in Parliament and consists of what we call Acts of Parliament. The third and bulkiest part is made by such persons or bodies as the King in Parliament entrusts with legislative power.'

"The power of delegation is a necessary incident to the exercise of legislative power and the practical reasons for such delegation have been stated to be :

'(a) Parliament's lack of time to shape all legislative details;

(b) lack of technical knowledge and aptitude of a miscellaneous assembly such as Parliament;

(c) the occurrence of conditions which require immediate attention at a time when Parliament is not in session or is otherwise incapable of giving immediate attention;

(d) a desire to preserve the essential elasticity of laws affecting peoples' lives so closely.' (See Carr on English Administrative

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[2] 1951 S C 332 (409) [AIR V 38 C 56] : 1951 S C R 747 (1012, 1013) (SC), *In re Delhi Laws Act, 1912.*

Law, page 23 and also Kennedy on the Constitution of Canada, 2nd Edition, page 461.)

"As observed by Sir Cecil Carr, 'the truth is that if Parliament were not willing to delegate law-making power, Parliament would be unable to pass the kind and quantity of legislation which modern public opinion requires.' In England, the practice of delegating legislative power has certainly been facilitated by the close fusion of the legislative and executive power resulting from the development of the cabinet system of Government in England.

"Delegated legislation has been divided in the Donoughmore Committee's Report into two classes, (i) normal and (ii) exceptional. The normal type is said to have two distinguishable characteristics, one positive and the other negative. In the normal type of delegation the 'positive characteristic is that the limits of the delegated power are defined so clearly by the enabling Act as to be made plainly known to Parliament, to the executive and to the public and to be readily enforceable by the judiciary'. The negative characteristic is that the powers delegated are stated not to include the power to do certain things. The exceptional type of delegation has been classified by the Donoughmore Committee under four heads, namely —

(i) power to legislate on matters of principle and even to impose taxation;

(ii) power to amend Acts of Parliament, either the Act by which the powers are delegated or other Acts (nicknamed as Henry VIII clause);

(iii) power conferring so wide a discretion on a Minister, that it is almost impossible to know what limit Parliament did intend to impose;

(iv) instances where Parliament, without formally abandoning its normal practice of limiting delegated powers, has in effect done so by forbidding control of the Courts.

"Kennedy in his book on the Constitution of Canada, 2nd Edition, page 463, also gives the instances of delegated legislative powers in Canada more or less on the same lines. The above heads clearly show the wide sweep of the power of delegation exercised by the British Parliament."

Bose, J., also observed[3] :

"It has been acknowledged in all free countries that it is impossible to carry on government of a modern State with its infinite complexities and ramifications without a large devolution of power and delegation of authority. It is needless to cite authority. The proposition is self-evident."

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[3] **1951 S C 332 (437) [AIR V 38 C 56] : 1951 S C R 747 (SC),** ***In re Delhi Laws Act, 1912.***

(b) Limits to delegation of legislative power: British and American theories.

As regards the limits within which the Legislature can delegate its authority to the executive or an administrative body, there are two different theories which may be called the British and American theories.

(c) British theory.

According to the British theory, so long as the Legislature does not completely divest itself of its legislative authority, there is no constitutional bar to the delegation of its authority by the Legislature.

The British Parliament is a sovereign body and the validity of its Acts is not open to question in any Court of law. But, even with reference to colonial Legislatures constituted under Acts of the British Parliament and therefore being subject to the limits imposed by a written Constitution, a similarly wide view of the powers of the Legislature has been taken by British Judges trained in the tradition of Parliamentary omnipotence. In *the Delhi Laws Act case*,[4] Patanjali Sastri, J., observed as follows :

> "Though no question of constitutionality of such legislation (delegated legislation) could arise in England itself, such problems have frequently arisen in the British Commonwealth countries which have written constitutions, and British Judges, trained in the tradition of Parliamentary omnipotence, have evolved the doctrine that every Legislature created by an Act of Parliament, though bound to act within the limits of the subject and area marked out for it, is, while acting within such limits, as supreme and sovereign as Parliament itself. Such Legislatures are in no sense delegates of the Imperial Parliament and, therefore, the maxim *delegatus non potest delegare* is not applicable to them. A delegation of legislative functions by them, however extensive, so long as they preserve their own capacity, cannot be challenged as unconstitutional. These propositions were laid down in no uncertain terms in the leading case of *Hodge* v. *The Queen*[5] decided by the Privy Council in 1883."

In *the Delhi Laws Act case*,[6] Das, J., also points out that the concept of a supreme sovereign Legislature was so vivid and deep rooted in the minds of the British people that they imputed even to a subordinate Legislature like the Australian Legislature, within its own field, all the attributes of the Imperial Parliament. Das, J., also quotes[7] the following passage from an article entitled 'The Law and

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[4] **1951 S C 332 (363) [AIR V 38 C 56] : 1951 S C R 747 (858) (SC),** ***In re Delhi Laws Act, 1912.***

[5] **(1884) 9 App Cas 117 (132) : 53 L J P C 1.**

[6] **1951 S C 332 (415, 416) [AIR V 38 C 56] : 1951 S C R 747 (1035, 1036) (SC),** ***In re Delhi Laws Act, 1912.***

[7] **1951 S C 332 (415, 416) [AIR V 38 C 56] : 1951 S C R 747 (1035) (SC),** ***In re Delhi Laws Act, 1912.***

the Constitution' by Mr. Justice Dixon published in 1935 in 51 Law Quarterly Review, page 590 at page 605:

> "This artificial and almost impracticable classification (the reference is to the American doctrine of separation of powers) was opposed to British practice and theory. The frame of our constitution in this respect follows the American plan. The notion that all law-making was confined to the Legislature which, therefore, could not authorise the executive to complete its work was so foreign to the conceptions of English law that the Australian Courts ignored, or were unaware of, the full consequences of the American plan we had adopted. In a series of decisions here, the power of the Commonwealth Parliament to authorise the executive to legislate by regulation was recognised and thus, in effect, established, although the logical difficulty created by the frame of the constitution was not adverted to."

(d) American Theory.

As regards what may be called the American theory, American Courts have approached the problem of delegated legislation along wholly different lines.[8] As seen in NOTE 4, the American Constitution is based on the doctrine of separation of powers. Along with this doctrine, another doctrine was also evolved, namely, that no department of the Government could delegate its power to another, as such delegation would be contrary to the maxim *delegatus non potest delegare* (A delegate cannot delegate). The result was that, according to American constitutional theory, the Legislature is not competent to delegate its legislative power to the executive or any other body. Prof. Willis in his CONSTITUTIONAL LAW OF THE UNITED STATES[9] observes:

> "It is a dogma that legislative power cannot be delegated either to other branches of the Government or to independent boards or commissions or even back to the people . . . . The rule against the delegation of legislative powers. . . . . . is broader than any doctrine of separation of powers. That part of it which forbids the delegation of powers to other branches of the Government comes within the doctrine of separation of powers. That part of it, which forbids the delegation of powers to independent boards or commissions, rests upon the maxim, *delegata potestas non potest delegari*."

Although the constitutional dogma in America is thus against the delegation of legislative authority by the Legislature, as a matter of actual practice a large amount of delegation has been going on and its validity has been upheld by the American Courts. The swift progress of the nation in the industrial and economical fields and the resulting complexities of administration forced the realization on the American Judges of the unavoidable necessity for large scale delegation of legislative powers to administrative bodies, and it was soon recognized that to deny this would be to stop the wheels of Government.[10] Hence, exceptions were made to the general theory on various grounds and these exceptions have become so many that it has led Prof. Willis[11] to observe: "the rule of the dogma has so many exceptions that it is difficult to decide whether the dogma or the exceptions state the true rule". The broad principle on which these exceptions are founded is that the prohibition against delegation applies only to the delegation of the determination of the legislative policy, and that where the Legislature lays down the policy and the principle and provides a standard for the guidance of the executive or the administrative authority to whom power is delegated, there is no constitutional objection to the delegation of power to fill in the details within the policy of, and according to the legal principles and standards established by, the Legislature, as the filling in of such matters of detail is essentially ministerial rather than legislative in character, even if considerable discretion is conferred upon the authority to which power is delegated.[12] The actual application, however, of the above principle to various cases has been a matter of much doubt, inasmuch as it is difficult to define precisely in general terms applicable to all cases what will be a matter of principle and what will be a matter merely of detail. The result has been that there has been a great deal of divergence in judicial decisions in delegation cases. The judicial dilemma in which Courts very often found themselves, when confronted with delegation cases, was resolved by the judicious choice of words. In *the Delhi Laws Act case*,[13] Kania, C. J., has made the following observation about this phase of the American law:

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[8] 1951 S C 332 (343, 344, 364, 410) [AIR V 38 C 56] : 1951 S C R 747 (787, 863, 1015, 1016) (SC), *In re Delhi Laws Act, 1912*.

[9] Constitutional Law of the United States by Prof. Willis, 1936 Edition, pp. 136-137.

> "The complexity of this question of delegation of power and the consideration of the various decisions in which its application has led to the support or invalidation of Acts has been somewhat aptly put by Schwartz on American Administrative Law. After quoting from *Wayman* v. *Southard*,[14] the observations of Marshall, C. J., that the line has not been exactly drawn which separates those important subjects which must be entirely regulated by the

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[10] 1951 S C 332 (364, 365) [AIR V 38 C 56] : 1951 S C R 747 (863, 864) (SC), *In re Delhi Laws Act, 1912.*

[11] Constitutional Law of the United States by Prof. Willis, 1936 Edn, P. 137.

[12] 1951 S C 332 (343, 344) [AIR V 38 C 56] : 1951 S C R 747 (787) (SC), *In re Delhi Laws Act, 1912.* (Crawford on Statutory Construction quoted.)

[13] 1951 S C 332 (344) [AIR V 38 C 56] : 1951 S C R 747 (789, 790), *In re Delhi Laws Act, 1912.*

[14] (1825) 6 Law Ed. 253 : 10 Wheat 1.

Legislature itself from those of less interest in which a general provision may be made and power given to those who are to act under such general provision to fill up details, the author points out that the resulting judicial dilemma, when the American Courts finally were squarely confronted with delegation cases, was resolved by the judicious choice of words to describe the word 'delegated power'. The authority transferred was, in Justice Holmes' felicitous phrase, 'softened by a quasi', and the Courts were thus able to grant the fact of delegated legislation and still to deny the name. This result is well put in Prof. Cushman's syllogism :

> 'Major premise : Legislative power cannot be constitutionally delegated by Congress.
>
> Minor premise : It is essential that certain powers be delegated to administrative officers and regulatory commissions.
>
> Conclusions : Therefore the powers thus delegated are not legislative powers.
>
> They are instead administrative or quasi-legislative powers'."

In spite of the above want of uniformity in the American decisions and in spite of the fact that delegation of its power by the Legislature has been upheld by the American Courts in a very large number of cases, constitutionally, the American theory is clear that delegation is forbidden except within certain permissible limits. Acts of the Legislature which transgress the permissible limits of delegation are void and their validity can be impeached in a court of law.

(e) Difference between American and British theories summed up.

According to the British theory, as seen already, there is no constitutional prohibition against delegation of legislative power by the British Parliament and the validity of no Act of the British Parliament can be questioned in any Court of law on the ground that it unconstitutionally delegates legislative power to the executive or any other body. But this is only a matter of constitutional theory, and even in England, the inordinate growth of delegated legislation has not been looked upon with favour. As pointed out by Mukherjea, J., in *the Delhi Laws Act case*,[15] the Report of the Committee on Ministers' Powers, otherwise known as the Donoughmore Committee, has recommended the imposition of checks on delegated legislation. The Report says that

> "the precise limits of a law-making power which Parliament intends to confer on a Minister should always be expressly defined

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[15] 1951 S C 332 (401) [AIR V 38 C 56] : 1951 S C R 747 (985, 986) (SC) *In re Delhi Laws Act, 1912.* (Mahajan J. also observed at p. 372 of the Report in AIR 1951 S C that "in spite of the widest powers possessed by the British Parliament, it has adopted a policy of self-abnegation in the matter of delegated legislation.")

> in clear language by the statute which confers it, when discretion is conferred, its limits should be defined with equal clearness."[16]

Further, a Select Committee on Statutory Instruments has been appointed in England for considering and reporting on every Bill proposing to delegate law-making power and for considering and reporting on every regulation and rule made in exercise of the power. Thus, in England, while the power of Parliament to legislate is unlimited and consequently the power of delegation is also without limits, the Parliament through the Select Committee, above referred to, is keeping a watchful eye on the activities of the persons or bodies to whom the power of legislation is delegated, so as to preserve its control over such delegated legislation.[17]

Thus, adapting the language of Patanjali Sastri, J., in *the Delhi Laws Act case*,[18] what is constitutionally competent is regarded as politically undesirable in England, while in America, it may be said that what is politically undesirable is treated as constitutionally incompetent. In other words, the question of delegated legislation is not one of *vires* under English law but is one of *vires* under the American law. But the desirability of checking excessive delegation of power by the Legislature is recognized both in America and in England.

From the above it will be noted that even in America, in spite of the theory of separation of powers, there is no absolute prohibition against delegation of power by the Legislature and that while the general principle is that the Legislature is not competent to delegate its power, this principle is subject to a vast number of exceptions which have not been precisely defined anywhere.

(f) Position under the Indian Constitution: Legislature has no plenary power of delegation.

As regards the position under the Indian Constitution, it is now well settled since the decision of the Supreme Court in *the Delhi Laws Act case*[19] that the Indian Legislatures have not an unlimited power of delegation of legislative power like the British Parliament. In *the Delhi Laws Act case*[20] it was contended by the Attorney-General, appearing for the President, that legislative power carried with it by necessary implication the power to delegate to the executive or any other body the law-making authority of the Legislature to such extent as the Legislature thought fit to delegate its authority. This contention was accepted by two of the Judges of the Supreme Court, Patanjali Sastri and Das, JJ. According to them, the American doctrine of separation of powers and the American theory of non-delegation of legislative power have no application in India and the Indian Legislatures under the Indian Constitution have powers of the same nature and extent, within their own allotted constitutional spheres, as those of the British Parliament.[21] But the other five Judges, who constituted the majority (Kania, C. J., Fazl Ali, Mahajan, Mukherjea and Bose, JJ.) rejected this view and although they conceded that the Legislature was competent to delegate a certain amount of its authority, they were not willing to accede to the proposition that the Indian Legislature had *plenary* powers of delegation similar to those of the British Parliament. In view of the majority decision in *the Delhi Laws Act case*[22] on this point, decisions to a contrary effect and attributing plenary powers of delegation of legislative power to the Indian Legislature,[23] must be treated as not good law now.

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[16] *Vide* Report P. 65 (Quotation taken from Mukherjea J.'s judgment in *Delhi Laws Act case*, 1951 S C R 747 (985, 986): AIR 1951 SC 332 (401) (Pr 247) (SC).)

[17] 1951 S C 332 (409, 410) [AIR V 38 C 56] : 1951 S C R 747 (1014) (SC), *In re Delhi Laws Act, 1912.*

[18] 1951 S C 332 (370) [AIR V 38 C 56] : 1951 S C R 747 (884) (S C), *In re Delhi Laws Act, 1912.*

[19] 1951 S C 332 (340, 355, 372, 395, 437, 438) [AIR V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[20] 1951 S C 332 (362) [AIR V 38 C 56]: 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

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[21] 1951 S C 332 (370, 427, 428) [AIR V 38 C 56] : 1951 S C R 747 (883, 884, 1078, 1079) (SC), *In re Delhi Laws Act, 1912.*

[22] 1951 S C 332 (346) (Kania, C. J.), 355 (Fazl Ali J.) 372 (Mahajan J.), 395 (Mukherjea J.), 437, 438 (Bose J.)) [AIR V 38 C 56]: 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[23] 1955 Nag 246 (252, 253) (Prs 34 to 38) [(S) AIR V 42 C 64] (FB), *Balkishan* v. *Totaldas.* (In this case, the Full Bench has taken the view that "in legislating upon subjects committed to the care of the Indian Legislature, it could legislate in the same manner as the Parliament at Westminster could do." The question before the Court was stated to be whether in enacting the impugned provision, the Legislature can be considered to have transgressed the limitation set by Lord Selborne in *Burah's case* (ILR 4 Cal 172) or by Viscount Haldane in the *Referendum case* (AIR 1919 P C 145 (149) : 1919 A C 935) and not whether in enacting the impugned provisions, the Legislature discharged the "essential legislative function." The question was propounded as being "can it be said that the Legislature failed to preserve its own capacity and created a new legislative power?" The Full Bench held that the test of the Legislature having discharged the "essential legislative function" was only adopted by a *minority* of the Judges in *the Delhi Laws Act case*, A I R 1951 S C 332, viz., Kania, C. J. Mahajan and Mukherjee JJ. It is submitted with respect that for the reasons elaborated in this Note, this reading of the judgments in *the Delhi Laws Act case* is not correct.)

1951 All 674 (697) (Pr 120) [AIR V 38 C 182] : ILR (1952) 2 All 46 (FB), *Suryapalsingh* v. *U. P. Govt.*

1951 All 44 (50) (Pr 11) [AIR V 38 C 7]: ILR (1952) 2 All 360: 52 Cri L Jour 1191 (DB), *State* v. *Basdeo.* (Per Desai J.).

[*See* 1954 All 538 (541, 542) [A I R V 41 C 216] : ILR (1954) 1 All 457 (FB), *Basti Sugar Mills, Ltd.* v. *State of Uttar Pradesh.* (Sapru J. in this case has expressed his concurrence with the minority Judges in *Delhi Laws Act case,* AIR 1951 S C 332.)

In *Kathi Raning* v. *State of Saurashtra*,[24] however, Patanjali Sastri, C. J., made some observations from which it would appear that he considered that the majority decision in *the Delhi Laws Act case*[25] had not rejected the view which he had taken in that case, namely, that the Legislature has a plenary authority of delegation. In *Kathi Raning's case*,[26] a contention was raised that certain provisions of law were void as delegating to the executive the power to amend a section in the Criminal Procedure Code and the counsel who raised the contention claimed that the majority view in *the Delhi Laws Act case*[27] supported his contention. In rejecting this contention, the learned Chief Justice observed as follows[28] :

> "On the second point, the appellant's learned counsel claimed that the majority view in *In re Constitution of India and Delhi Laws Act, 1912, etc.*,[29] supported his contention. He attempted to make this out by piecing together certain dicta found in the several judgments delivered in that case. While undoubtedly certain definite conclusions were reached by the majority of the Judges who took part in the decision in regard to the constitutionality of certain specified enactments, the reasoning in each case was different, and it is difficult to say that any particular principle has been laid down by the majority which can be of assistance in the determination of other cases. I have there expressed my view that Legislatures in this country have plenary authority to delegate their power to make laws to subordinate agencies of their choice and such delegation, however inexpedient or undesirable politically, is constitutionally competent. I accordingly reject this contention."

With great respect to the learned Chief Justice, it is submitted that although there are differences of opinion among the Judges of the Supreme Court in *the Delhi Laws Act case*,[30] there seems to be

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('49) 53 Cal W N 545 (548, 549) (DB), *Sushil Kumar* v. *Govt. of W. Bengal*. ("As it is a matter within the ambit of the power of the Legislature it can decide this itself or delegate the power to some one trusted by it.")]

[24] 1932 S C 123 (126) (Pr 9) [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC).

[25] 1951 S C 332 [AIR V 38 C 56]: 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[26] 1952 S C 123 [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC), *Kathi Raning* v. *State of Saurashtra.*

[27] 1951 S C 332 [A I R V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[28] 1952 S C 123 (126) (Pr 9) [AIR V 39] : 1952 S C R 435: 1952 Cri L Jour 805 (SC), *Kathi Raning* v. *State of Saurashtra.*

[29] 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (S C).

[30] 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act 1912.*

no room for doubt that the extreme view that the Indian Legislature had plenary and unrestricted power of delegation of legislative power was only taken by Patanjali Sastri and Das, JJ., and was not shared by any of the remaining five Judges. Kania, C. J., Mukherjea and Mahajan, JJ., definitely and unequivocally rejected the theory that the Legislature has an unlimited power of delegation of its law-making authority. The general approach of these three learned Judges to the question of delegated legislation was similar and their views were substantially similar to each other. The lines of approach adopted by Fazl Ali and Bose, JJ., were different. But even they did not take the view that the Legislature had unrestricted power of delegation of law-making authority.[31]

No doubt, Fazl Ali, J., has observed[32] :

> "Once it is established that it (Legislature) has sovereign powers within a certain sphere, it must follow as a corollary that it is free to legislate within that sphere in any way which appears to it to be the best way, to give effect to its intention and policy in making a particular law, and that it may utilize any outside agency to any extent it finds necessary for doing things which it is unable to do itself or finds it inconvenient to do."

But this sentence must be taken in the context of what follows immediately, namely, "In other words, it can do everything which is ancillary to and necessary for the full and effective exercise of its power of legislation." These latter words limit the meaning of the previous sentence and clearly negative the idea that the power of the Legislature to delegate its authority is unrestricted in the sense in which Patanjali Sastri and Das, JJ., hold it to be so. The limitation that the power of delegation of the Legislature is circumscribed by the principle that the Legislature can do what is *ancillary to or necessary for* effective legislation, is also found in other parts of the learned Judge's judgment.[33] Again, the learned Judge observes[34] :

> "There are only two main checks in this country on the power of the Legislature to delegate, these being its good sense and the principle that it should not cross the line beyond which delegation amounts to 'abdication and self-effacement'."

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[31] 1952 All 866 (868) (Pr 17) [AIR V 39] : 1952 Cri L Jour 1676 : ILR (1953) 2 All 226 (FB), *Bhushan Lal* v. *State*. (The above analysis of the judgments in *the Delhi Laws Act case* (AIR 1951 S C 332) receives support from the analysis in the judgment of the Full Bench in this case.)

[32] 1951 S C 332 (355) [AIR V 38 C 56] : 1951 S C R 747 (830) (SC), *In re Delhi Laws Act, 1912.*

[33] 1951 S C 332 (352, 354, 355) [A I R V 38 C 56] : 1951 S C R 747 (820, 827, 828, 829, 830, 831) (S C), *In re Delhi Laws Act, 1912.*

[34] 1951 S C 332 (355, 356) [A I R V 38 C 56] : 1951 S C R 747 (831) (SC), *In re Delhi Laws Act, 1912.*

What the learned Judge meant by "abdication and self-effacement" on the part of the Legislature may be gathered from his observations in another part of his judgment[35] where he said :

> "What constitutes abdication and what class of cases will be covered by that expression will always be a question of fact, and it is by no means easy to lay down any comprehensive formula to define it, but it should be recognized that the rule against abdication does not prohibit the Legislature from employing any subordinate agency of its own choice for doing such *subsidiary acts as may be necessary to make its legislation effective, useful and complete.*" (Italics ours.)

The learned Judge also points out in one part of his judgment,[36] while noting "certain important principles which can be extracted from the cases decided by the Privy Council," that the Privy Council never committed themselves to the statement that delegated legislation was permissible, although it was quite easy for them to have said so and disposed of the cases before them.

Taking the judgment of Fazl Ali, J., as a whole, it is clear that his Lordship did not agree with the extreme view taken by Patanjali Sastri and Das, JJ., although he went much further than Kania, C. J., and Mahajan and Mukherjea, JJ., in according to the Legislature a wide power of delegation.

As regards Bose, J., it is clear from his judgment that according to him the Legislature cannot empower the executive to introduce changes of an "essential character," while extending a law to a particular area. He has also held that the Legislature cannot empower the executive to repeal or amend the law already in force in a particular area, while extending a law to that area.[37] It is, therefore, clear that Bose, J., does not subscribe to the view that Legislature has *plenary* powers of delegation of law-making authority. Thus, even assuming that the judgment of Fazl Ali, J., (who concurred with Patanjali Sastri and Das, JJ., in upholding in their entirety the validity of the three Acts impugned in *the Delhi Laws Act case,*[38]) may be construed as supporting the view of Patanjali Sastri and Das, JJ., on the question of the plenary power of delegation of the Legislature, it is clear that the remaining four Judges, who constituted the majority, did not support this view.

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35. 1951 S C 332 (352, 353) [A I R V 38 C 56] : 1951 S C R 747 (820) (SC), *In re Delhi Laws Act, 1912.*

36. 1951 S C 332 (354) [A I R V 38 C 56] : 1951 S C R 747 (827) (SC), *In re Delhi Laws Act, 1912.*

37. 1951 S C 332 (439, 440) [AIR V 38 C 56] : 1951 S C R 747 (1121, 1122) (SC), *In re Delhi Laws Act, 1912.*

38. 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

Apart from this, the very fact that a majority of four to three held that the Legislature had no power to delegate to the executive the authority, while extending a law to a certain area, to repeal or amend a law which was already in force there, clearly shows that the majority of the Judges in *the Delhi Laws Act case*[39] rejected the view that the Legislature had *plenary* powers of delegation of law-making authority.

That this interpretation of the judgments in *the Delhi Laws Act case*[40] is correct is shown by the later judgment of the Supreme Court in *Rajnarain Singh* v. *The Chairman, Patna Administration Committee.*[41] In that case, Bose, J., delivering the judgment of the Court, observed as follows :

> "In our opinion, the majority view was that an executive authority can be authorized to modify either existing or future laws but not in any essential feature. Exactly what constitutes an essential feature cannot be enunciated in general terms, and there was some divergence of view about this in the former case (*Delhi Laws Act case*,[42]) but this much is clear from the opinions set out above : it cannot include a change of policy."

These words clearly show that the Supreme Court in the later case interpreted the majority view in *the Delhi Laws Act case*[43] as not supporting the theory of *plenary* powers of delegation laid down by Patanjali Sastri and Das JJ., in *the Delhi Laws Act case.*[44] Hence the view expressed by Patanjali Sastri C. J., in *Kathi Raning's case*[45] that the majority in *the Delhi Laws Act case*[46] had not negatived the view which he had taken in that case, namely, that the Legislature in India had plenary power of delegation of its law-making authority, is, it is submitted with respect, not tenable. It may also be noted in this connection that the other learned Judges of the Supreme Court in *Kathi Raning's case*[47] who concurred with

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[39] 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[40] 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[41] 1954 S C 569 (574) (Pr 31) [AIR V 41 C 131] : 1955 S C R 290 (SC).

[42] 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[43] 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[44] 1951 S C 332 (370, 428) [AIR V 38 C 56] : 1951 S C R 747 (883, 884, 1078, 1079) (SC), *In re Delhi Laws Act, 1912.*

[45] 1952 S C 123 (126) (Pr 9) [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC), *Kathi Raning* v. *State of Saurashtra.*

[46] 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[47] 1952 S C 123 (134, 137, 138) (Pr 39, 49, 55) [A I R V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC), *Kathi Raning* v. *State of Saurashtra.*

Patanjali Sastri, C. J. in holding that the legal provision which was impugned in that case was not void on the ground of unconstitutional delegation of legislative power, did so on a different ground, namely, that the impugned provision fell within the type of legislation known as conditional legislation and came within the ambit of the authority of the decision of the Privy Council in *Benoari Lal's case*[48] which upheld the validity of such legislation.

Further confirmation of the above view as to the effect of *the Delhi Laws Act case*[49] is also derived from the judgment of the Supreme Court in *Harishankar Bagla* v. *State of Madhya Pradesh*[50] in which it was observed as follows: "It was settled by the majority judgment in the *Constitution of India and Delhi Laws Act, 1912, etc.*[51] that essential powers of legislation cannot be delegated. . . . ."

(g) Permissible limits of delegation.

Thus, two propositions are clear :

(i) The Legislature *has* the power of delegation;

(ii) This power of delegation is not of a plenary character, but can only be exercised within certain limits.

The next question is : what are the permissible limits within which the Legislature can delegate its authority ?

(h) Importance of *the Delhi Laws Act case.*

On this question also, the decision of the Supreme Court in *the Delhi Laws Act case*[52] must be examined in order to see what guidance can be received from that decision. In this connection, the passage, which has already been quoted above from the judgment of Patanjali Sastri C. J. in *Kathi Raning* v. *State of Saurashtra*,[53] has to be referred to again. In that passage the learned Chief Justice has stated :

> "While undoubtedly certain definite conclusions were reached by the majority of the Judges who took part in the decision (in *the Delhi Laws Act case*[54]) in regard to the constitutionality of certain

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[48] 1945 P C 48 [AIR V 32] : 72 Ind App 57 : 1945 F C R 161 : ILR (1945) Kar (PC) 97 : 46 Cri L Jour 589 (PC), *Emperor* v. *Benoari Lal*.

[49] 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[50] 1954 S C 465 (468) (Pr 9) [AIR V 41 C 112] : 1954 Cri L Jour 1322 : 1955 S C R 380 (SC).

[*See also* 1952 All 866 (868) [AIR V 39] : 1952 Cri L Jour 1676 : ILR (1953) 2 All 226 (FB), *Bhushan Lal* v *State*. (The analysis in this Full Bench judgment, of the views in the *Delhi Laws Act case*, A.R 1951 S C 332, is similar to the above analysis.)]

[51] 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (SC).

[52] 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[53] 1952 S C 123 (126) (Pr 9) [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC).

[54] 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

specified enactments, the reasoning in each case was different, and it is difficult to say that any particular principle has been laid down by the majority which can be of assistance in the determination of other cases."

It has already been shown above that the majority of Judges in *the Delhi Laws Act case*[55] have agreed on the negative proposition that the power of the Indian Legislature to delegate its law-making authority is not of a plenary character. To this extent at least the learned Chief Justice's view that *the Delhi Laws Act case*[56] does not lay down any general principle but can only be an authority with regard to the validity of "certain specified enactments" is lacking in accuracy. But does the decision afford any *further* guidance and can any general principle be deduced from it as to the *permissible limits* of delegation of legislative power ?

(i) Propositions deducible from matters actually decided by *the Delhi Laws Act case.*

The decision was given on a reference to the Supreme Court under ART. 143, cl. (1) of the Constitution as to the validity of certain enactments. Doubts had arisen as to their validity, as a result of the decision of the Federal Court in *Jatindranath Gupta* v. *Province of Bihar.*[57]

The question raised was whether the above enactments were invalid as amounting to an unconstitutional delegation of legislative power to the executive. The enactments in question were :

(i) Section 7 of the Delhi Laws Act, 1912, which runs as follows:

> "*Power to extend enactments in force in other parts of the Provinces with modifications and restrictions.* — The Provincial Government may, by notification in the Official Gazette, extend with such restrictions and modifications as it thinks fit to the Province of Delhi or any part thereof, any enactment which is in force in any part of the Provinces at the date of such notification."

(ii) Section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, which runs as follows :

> "*Extension of enactments to Ajmer-Merwara.* — The Central Government may, by notification in the Official Gazette, extend to the Province of Ajmer-Merwara with such restrictions and modifications as it thinks fit any enactment which is in force in any other Province at the date of such notification."

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[55] 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[56] 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[57] 1949 F C 175 [AIR V 36 C 30] : ILR 28 Pat 703 : 50 Cri L Jour 897 : 1949 F C R 595 (FC).

(iii) Section 2 of the Part C States (Laws) Act, 1950, which runs as follows :

> "*Power to extend enactments to certain Part C States.* — The Central Government may, by notification in the Official Gazette, extend to any Part C State (other than Coorg and the Andaman and Nicobar Islands) or to any part of such State with such restrictions and modifications as it thinks fit, any enactment which is in force in a Part A State at the date of the notification and provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C State."

All the above three Acts were passed by the Central Legislature and they related to three different periods in the constitutional development of India. Thus, the first Act, namely, the Delhi Laws Act was passed in 1912, that is, during the period prior to the Government of India Act, 1915. The second Act, namely, the Ajmer-Merwara (Extension of Laws) Act, 1947, was passed under the Government of India Act, 1935, as amended by the Independence Act, 1947. And the last Act, namely, the Part C States (Laws) Act, 1950, was passed after the coming into force of the present Constitution.

The following features about the above provisions may be noted:

(i) The power conferred is of a sweeping nature and the laws, which the executive is empowered to extend, are not given in any schedule or otherwise enumerated, the executive being given the widest power to pick and choose any laws made by the same Legislature or any other Legislature in the country.

(ii) The laws, which the executive is empowered to extend, include not only the laws passed by the Central Legislature but also those passed by Provincial Legislatures.

(iii) The executive is empowered to extend not only laws which are in existence at the time of the passing of the enabling Act but also future laws that may be in force at the time when the executive issues the notification of extension.

(iv) The executive is given the power to restrict or modify the law as it thinks fit when it extends it to an area.

(v) Under the second part of Section 2 of the Part C States (Laws) Act, 1950, the executive is given the power, when extending any enactment to an area, to repeal or amend any corresponding law other than a Central Act, which is already in force in that area.

The reference was heard by a Bench of seven Judges (Kania, C. J., Fazl Ali, Patanjali Sastri, Mahajan, Mukherjea, Das and Bose, JJ.) who delivered separate judgments. The Judges adopted different lines of reasoning. But so far as the matters actually decided are concerned, their conclusions may be summarised as follows :

Three of the learned Judges, Patanjali Sastri, Das and Fazl Ali, JJ., held all the three enactments to be valid in their entirety. Mahajan, J., held the opposite extreme, namely, that all the three enactments were void in toto. The other Judges, Kania, C. J., Mukherjea and Bose, JJ., took intermediate views.

According to Kania, C. J., the three sections are *ultra vires* the Legislatures functioning at the relevant dates to the extent power is given to the Government (the executive) to extend Acts other than Acts of the Central Legislature. In other words, according to Kania, C. J., a Legislature cannot empower the Executive to extend to any area Acts passed by other Legislatures, but can empower the Executive to extend Acts passed by itself, whether such Acts are already in existence or passed subsequently. It would seem that he also concedes that in extending Acts passed by the same Legislature, the Executive can be empowered to make incidental changes of a minor character, not affecting any essential feature of the Act extended.

According to Mukherjea and Bose, JJ., S. 7 of the Delhi Laws Act and S. 2 of the Ajmer-Merwara (Extension of Laws) Act, are wholly valid. But as regards S. 2 of the Part C States (Laws) Act, 1950, the learned Judges hold that the first part of it is valid but the second part is not valid. The first part relates to the power to extend laws and corresponds to S. 7 of the Delhi Laws Act, 1912, and S. 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947. The second part of S. 2 of the Part C States (Laws) Act, 1950, empowers the Executive, while extending any enactment to an area, to repeal or amend any corresponding law other than a Central Act which is for the time being applicable to that area.

Thus, the matters actually decided in *the Delhi Laws Act case*[58] may be taken to establish the following propositions :

(i) The Legislature can empower the Executive to extend to any area within the legislative jurisdiction of the Legislature *any* law that may be passed by the same Legislature, whether such law is in existence at the time of the passing of the enabling Act or is passed subsequently. (Majority of six to one, that is, all the Judges except Mahajan, J., according to whom such a *carte blanche* power is too sweeping a delegation of legislative power to be valid.)

(ii) The Legislature can empower the Executive to extend laws passed by *other* Legislatures also, whether already in force or passed subsequently. (Majority of five to two, that is, all the Judges, except Kania, C. J. and Mahajan, J.)

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[58] 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

(iii) In extending laws to any area, the Executive may be empowered to make incidental changes which do not affect any essential features of the Act. (On this point, there does not seem to be any difference of opinion.)

(iv) In extending an Act to an area, the Executive cannot be empowered to make any alteration in the Act which affects it with regard to an essential feature or alters its policy. (Majority of four—Kania, C. J., Mahajan, Mukherjea and Bose, JJ., against three, Patanjali Sastri, Das and Fazl Ali, JJ.)

(v) In extending an Act to a particular area, the Executive cannot be empowered to repeal or amend any Act which is already in force there.[59]

The above summary substantially accords[60] with the interpretation of the decision in *the Delhi Laws Act case*[61] by the Supreme Court in its later judgment in *Rajnarain Singh* v. *Chairman, Patna Administration Committee.*[62] In that case, Bose, J., delivering the judgment of the Court, observed as follows :

"Because of the elaborate care with which every aspect of the problem was examined in that case, the decision has tended to become diffuse, but if one concentrates on the matters actually decided and forgets for a moment the reasons given, a plain pattern emerges leaving only a narrow margin of doubt for future dispute.

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[59] It may be questioned whether there is a majority concurring in this proposition in the *Delhi Laws Act case*, 1951 S C R 747 : A I R 1951 S C 332. Patanjali Sastri, Das and Fazl Ali, JJ., have held that the second part of S. 2 of the Part C States (Laws) Act, 1950, which is the provision in question in this context, is valid. Mahajan, Bose and Mukherjea JJ. have taken a contrary view. But Kania C. J., has not expressed any opinion on this aspect of the case, as his opinion that all the three impugned provisions are void in so far as they empower the extension of provincial laws, makes a decision on the question about the validity of the second part of S. 2 of the Part C States (Laws) Act, 1950, unnecessary, inasmuch as second part only relates to cases where Provincial Acts are extended. Thus, strictly speaking, opinion on this question as to the validity of repealing or amending a pre-existing law, while extending a certain law to an area, seems to be equally divided. But the later judgment of the Supreme Court in *Rajnarain Singh* v. *Chairman, Patna Administration Committee*, A I R 1954 S C 569 has taken the *Delhi Laws Act case* to establish the proposition as stated above in the Commentary—See the summary from the judgment in *Rajnarain's case* which is quoted in the next para in the Commentary.

[60] Bose J., has stated that Kania C. J. excluded the application of *future* legislation, whether of the Centre or of the Provinces — See A I R 1954 S C 569 (573) (Pr. 25-26). This does not seem to be correct. Kania C. J. has only excluded the application of Provincial laws—that is, laws not made by the same Legislature. As regards Central laws, he has not made any distinction between laws already in existence and future laws — See 1951 S C R 747 (800, 805) : A I R 1951 S C 332 (347, 349) especially the last paragraph of his judgment on the latter page.

[61] 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act, 1912.*

[62] 1954 S C 569 (572, 574) (Prs 23, 24, 31) [AIR V 41 C 131]:1955 SCR 290 (SC).

"The Court had before it the following problems. In each case, the Central Legislature had empowered an executive authority under its legislative control to apply, at its discretion, laws to an area which was also under the legislative sway of the Centre. The variations occur in the type of laws which the executive authority was authorized to select and in the modifications which it was empowered to make in them. The variations were as follows :

(1) Where the executive authority was permitted, at its discretion, to apply without modification (save incidental changes such as name and place), the whole of any Central Act already in existence in any part of India under the legislative sway of the Centre to the new area : This was upheld by a majority of six to one.

(2) Where the executive authority was allowed to select and apply a Provincial Act in similar circumstances : This was also upheld, but this time by a majority of five to two.

(3) Where the executive authority was permitted to select future Central laws and apply them in a similar way : This was upheld by five to two.

(4) Where the authorisation was to select future Provincial laws and apply them as above : This was also upheld by five to two.

(5) Where the authorisation was to repeal laws already in force in the area and either substitute nothing in their places or substitute other laws, Central or Provincial, with or without modification : This was held to be '*ultra vires*' by a majority of four to three.

(6) Where the authorisation was to apply existing laws, either Central or Provincial, with alterations and modifications; and

(7) Where the authorisation was to apply future laws under the same conditions.

"The views of the various members of the Bench were not as clear cut here as in the first five cases, so it will be necessary to analyse what each Judge said . . . . . .

"In our opinion, the majority view was that an executive authority can be authorised to modify either existing or future laws but not in any essential feature. Exactly what constitutes an essential feature cannot be enunciated in general terms, and there was some divergence of view about this in the former case, but this much is clear from the opinions set out above : it cannot include a change of policy."

Thus, the matters actually decided in *the Delhi Laws Act case*[63] establish certain general propositions which are not confined to the constitutional validity of the particular enactments which were in question in that case. Hence it is submitted that the opinion expressed by Patanjali Sastri, C. J., in *Kathi Raning's case*[64] (see passage quoted already) that *the Delhi Laws Act case*[65] does not establish any general principle useful for the decision of future cases but is only useful as deciding questions concerning the constitutional validity of "certain specified enactments", is not correct.

(j) Reasoning in *the Delhi Laws Act case* —Principle deducible from — Essential legislative power cannot be delegated.

As regards the *reasoning* adopted by the learned Judges in the several judgments in *the Delhi Laws Act case*,[66] the judgments seem to fall into four groups: (i) Kania, C. J., Mahajan and Mukherjea, JJ., (ii) Patanjali Sastri and Das, JJ., (iii) Fazl Ali, J., and (iv) Bose, J.

Kania, C. J., Mahajan and Mukherjea, JJ., adopt a strict view of the power of the Legislature to delegate its functions and while they concede the inevitability of such a power, they would broadly confine it to the types of legislation known as conditional legislation and subsidiary legislation. They strongly repudiate the theory that in the absence of express prohibition against delegation legislative power carries with it the power of delegation. According to them, the general principle is that the Legislature cannot delegate its law-making authority to any other body or department of the Government and that it is strictly by way of exceptions to this general principle that the Legislature can delegate its power at all. Apart from express provisions in the constitutional enactment, these exceptions fall into the two categories mentioned above.

Thus, Mahajan, J., observes[67] as follows :

> "For the reasons given above I cannot accept the proposition contended for by the learned Attorney-General that in the absence of an express or implied provision in the Constitution legislative authority can be bestowed on other persons. In my opinion, the correct proposition, on the other hand, is that unless expressly or

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[63] **1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (SC),** *In re Delhi Laws Act, 1912.*

[64] **1952 S C 123 (126) (Pr 9) [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (S C),** *Kathi Raning* **v.** *State of Saurashtra.*

[65] **1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (SC),** *In re Delhi Laws Act, 1912.*

[66] **1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (SC),** *In re Delhi Laws Act, 1912.*

[67] **1951 S C 332 (387) [A I R V 38 C 56] : 1951 S C R 747 (940) (S C),** *In re Delhi Laws Act, 1912.*

impliedly authorized, such delegation is not permissible. The exceptions to this rule fall in two classes which have been stated in the quotation from Crawford's book earlier cited in this judgment."

The quotation from Crawford's book (CONSTRUCTION OF STATUTES, at pages 25-26) earlier cited in his judgment is as follows :

> "Legislative power has been delegated, as a general rule, not so often as an effort to break down the triparte theory of the separation of powers, but from necessity and for the sake of convenience. More and more with a social system steadily becoming increasingly complex, the Legislature has been obliged in order to legislate effectively, efficiently and expeditiously, to delegate some of its functions, not *purely legislative in character*, to other agencies, particularly to administrative officials and boards. *Most prominent among the powers thus delegated have been the power to ascertain facts, and the power to promulgate rules and regulations.* Many of the other delegated powers, upon analysis, fall within one of these two major or basic classifications."[68]

The underlying principle on which the exceptions are allowed is that where the Legislature lays down the principle and policy of the legislation itself, it can leave details and unessential matters to another body. In other words, the trend of their judgments is to make a distinction between essential legislative power and unessential legislative power and to hold that while the former cannot be delegated, the latter can. In fact, according to Kania, C. J., there is *no* delegation of legislative power at all in the real sense of the term in the types of legislation known as conditional legislation and subsidiary legislation, and therefore according to him, although conditional legislation and subsidiary legislation are valid, the main proposition still holds good, namely, that legislative power in the real sense of the power, cannot be delegated. He says[69] :

> "When a legislative body passes an Act it has exercised its legislative function. The essentials of such function are the determination of the legislative policy and its formulation as a rule of conduct. These essentials are the characteristics of a Legislature by itself. It has nothing to do with the principle of division of powers found in the Constitution of the United States of America. Those essentials are preserved, when the Legislature specifies the basic conclusions of fact, upon ascertainment of which, from relevant data, by a designated administrative agency, it ordains that its statutory command is to be effective. The Legislature having thus

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[68] *See* 1951 S C 332 (381) [A I R V 38 C 56] : 1951 S C R 747 (920) (S C), *In re Delhi Laws Act, 1912.*

[69] 1951 S C 332 (338) [AIR V 38 C 56] : 1951 S C R 747 (767, 768) (S C), *In re Delhi Laws Act, 1912.*

made its laws, it is clear that every detail for working it out and for carrying the enactments into operation and effect may be done by the Legislature or may be left to another subordinate agency or to some executive officer. While this also is sometimes described as a delegation of legislative powers, in essence it is different from delegation of legislative power which means a determination of the legislative policy, and formulation of the same as a rule of conduct. I find that the word "delegation" is quite often used without bearing this fundamental distinction in mind. While the so-called delegation, which empowers the making of rules and regulations, has been recognised as ancillary to the power to define legislative policy and formulate the rule of conduct, the important question raised by the Attorney-General is in respect of the right of the Legislature to delegate the legislative functions strictly so called."

The following passage from Kania C. J.'s judgment may also be quoted as expressing his views as to the permissible limits of delegation of legislative power[70]:

> "As a result of considering all these decisions together it seems to me that the Legislature in India, Canada, Australia and the United States of America has to discharge its legislative functions, i.e., to lay down a rule of conduct. In doing so it may, in addition, lay down conditions, or state facts which on being fulfilled or ascertained according to the decision of another body or the executive authority, the legislation may become applicable to a particular area. This is described as conditional legislation. The Legislature may also, in laying down the rule of conduct, express itself generally if the conditions and circumstances so require. The extent of the specific and detailed lines of the rule of conduct to be laid down may vary according to the circumstances or exigencies of each case. The result will be that if, owing to unusual circumstances or exigencies, the Legislature does not choose to lay down detailed rules or regulations, that work may be left to another body which is then deemed to have subordinate legislative powers."

Mukherjea, J., whose line of reasoning is essentially similar to that of Kania, C. J., records his conclusions on the question of delegated legislation as follows[71]:

> "On a consideration of all these decisions I have no hesitation in holding that as regards constitutionality of the delegation of legislative powers the Indian Legislature cannot be in the same position as the omnipotent British Parliament and how far delega-

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[70] **70.** 1951 S C 332 (346, 347) [AIR V 38 C 56] : 1951 S C R 747 (798, 799) (S C), *In re Delhi Laws Act, 1912.*

[71] **71.** 1951 S C 332 (404) [A I R V 38 C 56] : 1951 S C R 747 (997) (S C), *In re Delhi Laws Act, 1912.*

tion is permissible has got to be ascertained in India as a matter of construction from the express provisions of the Indian Constitution. It cannot be said that an unlimited right of delegation is inherent in the legislative power itself. This is not warranted by the provisions of the Constitution and the legitimacy of delegation depends entirely upon its being used as an ancillary measure which the Legislature considers to be necessary for the purpose of exercising its legislative powers effectively and completely. The Legislature must retain in its own hands the essential legislative functions which consist in declaring the legislative policy and laying down the standard which is to be enacted into a rule of law, and what can be delegated is the task of subordinate legislation which by its very nature is ancillary to the statute which delegates the power to make it. Provided the legislative policy is enunciated with sufficient clearness or a standard laid down the Courts cannot and should not interfere with the discretion that undoubtedly rests with the Legislature itself in determining the extent of delegation necessary in a particular case. These, in my opinion, are the limits within which delegated legislation is constitutional, provided of course the legislature is competent to deal with and legislate on the particular subject-matter."

Mahajan, J.'s reasoning, as already stated, is also on the same lines but he is more emphatic than Kania, C. J. and Mukherjea, J., in the expression of his views. He states his conclusions as follows[72]:

> "It must be held that in the absence of express powers of delegation allowed by the Constitution, Parliament has no power to delegate its essential legislative functions to others, whether State Legislatures or executive authorities, except of course functions which really in their true nature are ministerial."

Again, he says[73]:

> "Delegation of legislative power to the executive in matters essential is unconstitutional. Any legislative practice adopted during the pre-Constitution period for undeveloped and excluded areas can have no relevancy in the determination of this point."

As regards Patanjali Sastri and Das, JJ., it has already been mentioned that they have adopted the view that the Legislature has *plenary* powers of delegation and so in their case the question as to the *permissible limits* of delegation does not really arise.

Fazl Ali, J., as already mentioned, has not taken the extreme stand taken by Patanjali Sastri and Das, JJ. But he does not also seem to subscribe to the strict view taken by Kania, C. J., Mahajan and Mukherjea, JJ., and would seem to hold that the Legislature can delegate to the Executive legislative power even in matters of principle in some cases. The following passage from his judgment[74] expresses his views on the subject:

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[72] 1951 S C 332 (389) [A I R V 38 C 56] : 1951 S C R 747 (946) (S C), *In re Delhi Laws Act, 1912.*

[73] 1951 S C 332 (389) [A I R V 38 C 56] : 1951 S C R 747 (947) (S C), *In re Delhi Laws Act, 1912.*

> "The Legislature in order to function effectively, has to call for sufficient data, has to legislate for the future as well as for the present and has to provide for a multiplicity of varying situations which may be sometimes difficult to foresee. In order to achieve its object, it has to resort to various types and forms of legislation, entrusting suitable agencies with the power to fill in details and adapt legislation to varying circumstances. Hence, what is known as conditional legislation, an expression which has been very fully explained and described in a series of judgments, and what is known as subordinate legislation, which involves giving power to subordinate authorities to make rules and regulations to effectuate the object and purpose for which a certain law is enacted, have been recognized to be permissible forms of legislation on the principle that a Legislature can do everything which is ancillary to or necessary for effective legislation. Once this is conceded, it follows that the Legislature can resort to any other form of legislation on the same principle, provided that it acts within the limits of its power, whether imposed from without or conditioned by the nature of the duties it is called upon to perform.
>
> "The conclusions at which I have arrived so far may now be summed up:
>
> (1) The Legislature must normally discharge its primary legislative function itself and not through others.
>
> (2) Once it is established that it has sovereign powers within a certain sphere, it must follow as a corollary that it is free to legislate within that sphere in any way which appears to it to be the best way to give effect to its intention and policy in making a particular law, and that it may utilize any outside agency to any extent it finds necessary for doing things which it is unable to do itself or finds it inconvenient to do. In other words, it can do everything which is ancillary to and necessary for the full and effective exercise of its power of legislation.
>
> (3) It cannot abdicate its legislative functions, and therefore, while entrusting power to an outside agency, it must see that such agency acts as a subordinate authority and does not become a parallel Legislature.

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[74] 1951 S C 332 (355, 356) [A I R V 38 C 56] : 1951 S C R 747 (829-831) (S C), *In re Delhi Laws Act, 1912.*

> (4) The doctrine of separation of powers and the judicial interpretation it has received in America ever since the American Constitution was framed, enables the American Courts to check undue and excessive delegation but the Courts of this country are not committed to that doctrine and cannot apply it in the same way as it has been applied in America. Therefore, there are only two main checks in this country on the power of the Legislature to delegate, these being its good sense and the principle that it should not cross the line beyond which delegation amounts to 'abdication and self-effacement'."

Bose, J., also is taking an individual stand and wishes to avoid phrases like abdication by Legislature, conditional legislation, etc. According to him, legislation on the lines of *Empress* v. *Burah*,[75] is valid and there is no change in the constitutional position so far as this proposition is concerned as a result of the present Constitution. The three Acts impugned in the case, which empower the executive to extend laws to certain areas, fall within the principle of *Empress* v. *Burah*[76] and are therefore valid. But the power of amending or repealing a law which is already in existence is not covered by the authority of *Empress* v. *Burah*[77] and is not valid. In this connection he also says:

> "I feel that a body which has been entrusted with the powers of legislation should legislate and not leave the decision of important matters of principle to other minds.[78]"

He also expresses his view that the power to restrict and modify a law which the executive is empowered to extend, does not import the power to make essential changes. He says:

> "To alter the essential character of an Act or to change it in material particulars is to legislate, and that, namely, the power to legislate, all authorities are agreed, cannot be delegated by a Legislature which is not unfettered."

Thus, on the whole, Bose, J.'s line of reasoning seems to be parallel to that of Kania, C. J., Mahajan and Mukherjea, JJ. Like them, he draws a distinction between essential legislative power and unessential legislative power and holds that the former cannot be delegated. This interpretation of his view in *the Delhi Laws Act case*,[79] receives support from his judgment delivered on behalf of the Supreme Court in the later decision of *Rajnarain Singh* v. *Chairman, Patna Administration Committee.*[80]

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[75] ('79) I L R 4 Cal 172 : 5 Ind App 178 (P C).

[76] ('79) I L R 4 Cal 172 : 5 Ind App 178 (P C).

[77] ('79) I L R 4 Cal 172 : 5 Ind App 178 (P C).

[78] 1951 S C 332 (439, 440) [A I R V 38 C 56] : 1951 S C R 747 (1121) (S C), *In re Delhi Laws Act, 1912.*

[79] 1951 S C 332 [A I R V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act, 1912.*

Thus, it may be said to be established by the majority view in *the Delhi Laws Act case*[81] that the Legislatures under the Indian Constitution have no power to delegate to the Executive or any other body the power of law-making in the sense of determining the legislative policy and formulating it into a rule of conduct. What constitutes a matter of principle and legislative policy cannot be defined in general terms and will depend on the peculiar considerations applicable to each case.[82]

The above view of the effect of *the Delhi Laws Act case*[83] is confirmed by the judgments of the Supreme Court in subsequent cases.[84] In *Hari Shankar Bagla* v. *State of Madhya Pradesh,*[85] Mahajan C. J., delivering judgment of the Supreme Court, observed as follows :

> "It was settled by the majority judgment in the *Constitution of India and Delhi Laws Act, 1912 etc.,*[86] that essential powers of legislation cannot be delegated. In other words, the Legislature cannot delegate its function of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. The Legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law. The essential legislative function consists in the determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct."

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[80] 1954 S C 569 [A I R V 41 C 131] : 1955 S C R 290 (S C).

[81] 1951 S C 332 [A I R V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act, 1912.* (Per Kania C. J., Mahajan, Mukherjea and Bose JJ.)

[82] 1955 Madh B 177 (178) [(S) A I R V 42 C 54] (DB), *Firm Kashiram Biharilal* v. *Badrilal.* ("The question, though often beset with difficulties, has to be answered with reference to the nature of the impugned legislation.")

[83] 1951 S C 332 [A I R V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act, 1912.*

[84] 1954 S C 569 (574) (Pr 31) [A I R V 41 C 131] : 1955 S C R 290 (S C), *Rajnarain Singh* v. *Chairman P. A. Committee.*

1954 S C 465 (468) (Pr 9) [A I R V 41 C 112] : 1955 S C R 380 : 1954 Cri L Jour 1322 (S C), *Hari Shankar Bagla* v. *M. P. State.*

[85] 1954 S C 465 (468) (Pr 9) [A I R V 41 C 112] : 1955 S C R 380 : 1954 Cri L Jour 1322 (S C). (The preamble and the body of the sections in the Essential Supplies (Temporary Powers) Act (1946) sufficiently formulate the legislative policy and the ambit and character of the Act is such that the details of that policy can only be worked out by delegating them to a subordinate authority within the framework of that policy. S. 3 of the Act, therefore, does not amount to delegation of legislative power outside the permissible limits.)

[86] 1951 S C 332 [A I R V 38 C 56] : 1951 S C R 747 (S C).

In *Rajnarain Singh* v. *Chairman, Patna Administration Committee,*[87] Bose J., delivering the judgment of the Supreme Court, summed up the majority view in *the Delhi Laws Act case*[88] as follows :

> "In our opinion, the majority view was that an executive authority can be authorised to modify either existing or future laws but not in any essential feature. Exactly what constitutes an essential feature cannot be enunciated in general terms, and there was some divergence of view about this in the former case, but this much is clear from the opinions set out above: it cannot include a change of policy."

In some of the judgments of the High Courts[89] a different view

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87. 1954 S C 569 (574) (Pr 31) [A I R V 41 C 131] : 1955 S C R 290 (S C).

88. 1951 S C 332 [A I R V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act, 1912.*

89. In *Bhushan Lal* v. *State,* A I R 1952 All 866 (869) : 1952 Cr L Jour 1676 : ILR (1953) 2 All 226 (FB), the Full Bench expressed the view that in *the Delhi Laws Act Case* (A I R 1951 S C 332) "there is no majority for the view that the Legislature must in all cases enunciate a policy or lay down a standard". It is submitted with respect that this view is not correct. As shown above, Bose, J. clearly indicated his view that a matter of legislative *policy* cannot be delegated to the executive, and thus there was a clear majority in support of this view in *the Delhi Laws Act Case.* This interpretation of that case is supported by the subsequent decisions of the Supreme Court, e. g. A I R 1954 S C 465 (468) and A I R 1954 S C 569 (574).

The above criticism of the Allahabad Full Bench Case in AIR 1952 All 866 is also applicable to the Full Bench decision of the Nagpur High Court in *Balkishan Nathani* v. *Totaldas Motumal,* A I R 1955 Nag 246 (252, 253). In that case it was held that the majority view in *the Delhi Laws Act Case* was only to the effect that on enacting a law, the Legislature could not transgress the limitation set by certain P. C. authorities, e. g., *Burah's Case* (I L R 4 Cal 172) and *Referendum Case* (A I R 1919 P C 145 (149) : 1919 A C 935) and only a minority of the Judges (viz. Kania C. J. Mahajan and Mukherjea JJ.) had held that the test was whether the Legislature had discharged "the essential legislative function," and that "it was for the *Legislature* to declare the policy, establish the standard and prescribe a rule of conduct". As will be seen from the discussion in the Commentary in this Note, this view as to the meaning and effect of the judgments of the Supreme Court in *the Delhi Laws Act Case* is not correct.

[*See also* 1955 N U C (Mad) 2421 [AIR V 42], *S. K. Velayutha Mudaliar* v. *District Munsiff of Vridhachalam South Arcot.* (The trend of observations in this judgment seems to suggest that the actual decision in *the Delhi Laws Act Case,* AIR 1951 S C 332, supports the theory that even legislative power can be delegated to the executive. Fazl Ali J.'s judgment is treated as "delivered on behalf of the majority Judges".

1953 Mad 105 (111) [A I R V 40 C 35] : 1953 Cri L Jour 277 (DB), *V. M. Syed Mohamed and Co.* v. *State of Madras.* (The observations in this case also suggest that according to the majority view in *the Delhi Laws Act Case* the test of the validity of delegated legislation is whether the Legislature has "abdicated its functions" in favour of the rule-making authority. With great respect, it is submitted that in so far as it takes away the attention from as to the effect of the decision in *the Delhi Laws Act case*[90] has been taken and the opinion has been expressed that the majority of the Judges in that case have not ruled out the delegation even of what may be termed 'legislative policy' by the Legislature to the Executive. It will be seen that in view of the subsequent decisions of the Supreme Court itself, above referred to, this interpretation of the judgments in *the Delhi Laws Act case*[91] is not correct. Reference has already been made above (see NOTE 8 (f)) to the decisions which hold that the Legislature has *plenary powers* of delegation and which must now be regarded as no longer good law.

(k) Conditional and subsidiary legislation.

Apart from this negative aspect, it will be seen from the above review of the reasoning in the several judgments in *the Delhi Laws Act case*[92] that the case also establishes the *positive* propositions that the types of legislation known as conditional legislation and subsidiary legislation are valid. This is expressly mentioned by Kania C. J., Mahajan, Mukherjea and Fazl Ali JJ., and necessarily involved in the view of Patanjali Sastri and Das JJ., as, according to them, the Legislature has *unrestricted* power of delegation.

(l) Different conclusions on similar reasoning.

Although the different lines of reasoning adopted by the Judges in *the Delhi Laws Act case*[93] are capable of classification to a considerable extent as shown above, a comparison of the classification of the reasoning with the classification of the actual decisions on the issues in the case shows a difference of views not only as to the principles but also as to their application to the actual issues in the case. Thus, although the views of Kania C. J., Mahajan and Mukherjea JJ., seem to be practically identical as regards the principles and the general approach to the question of delegated legislation, the learned Judges have come to three different conclusions as regards the actual issues before them. As already mentioned Mahajan J., holds that all the three impugned enactments are void in toto. According to Kania C. J., the enactments are valid to the extent that the Executive is empowered to extend Acts of the Central Legislature but not to the extent that the Executive is empowered to extend provincial laws. According to Mukherjea J., the impugned enactments are valid both as to the central and provincial laws; but

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the *nature* of the matters on which rule-making power has been delegated the test is not in accordance with the majority view in *the Delhi Laws Act case.*)]

[90] **90.** 1951 S C 332 [A I R V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act 1912.*

[91] **91.** 1951 S C 332 [A I R V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act 1912.*

[92] **92.** 1951 S C 332 [A I R V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act, 1912.*

[93] **93.** 1951 S C 332 [A I R V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act, 1912.*

he holds that the provision enabling the Executive to amend or repeal an already existing law is *ultra vires*.

(m) Effect of *Delhi Laws Act Case* summed up.

Thus, to sum up the contribution of *the Delhi Laws Act case*[94] to the solution of the problem of delegated legislation, the *actual decision* in the case establishes certain propositions which have already been formulated. Apart from this, the *reasoning* in the several judgments also shows a concurrence of the majority of the Judges in certain general principles, which, therefore, may be treated as established by the case. These general principles are :

(i) The Legislature has no plenary or unrestricted power of delegation.

(ii) The Legislature cannot delegate legislative power in regard to essential matters or matters of legislative *policy*. What constitutes such matters cannot, however, be laid down in precise terms, so as to obviate conflicts of opinion in the actual application of the principle to concrete cases.

(iii) The types of legislation known as conditional legislation and subsidiary legislation are valid, whether they are viewed as exceptions to the rule of non-delegation or as not amounting to delegation of legislative power at all.

The general features of conditional and subsidiary legislation are fairly well understood. But in the actual application of the principles to concrete cases, much difference of opinion is possible.

From the above, it is clear that except for the propositions deducible from the matters *actually decided* in the case, *the Delhi Laws Act case*[95] cannot be said to have *precisely* defined the limits of permissible delegation of legislative power, so as to avoid doubts or conflicts of views in the actual decision of future cases.

But certain *general* principles have been laid down and future cases will have to be decided in accordance with such principles, although there may be room for doubt or difference of views in regard to the *mode of their application* to particular cases.

(n) Difficulty of defining principles precisely is no reason for denying their existence.

In this connection, it may be mentioned that one of the considerations which seem to have weighed with Das J., in holding that the Legislature has plenary and unrestricted power of delegation is that the suggested limits of permissible delegation were not capable of *precise* definition so as to avoid the possibility of conflict of views in their actual application to concrete cases. With great respect, it is submitted that this reasoning does not appear to be sound. That the limits of a certain matter can only be defined in a *general* way and not *precisely* does not seem to be any reason for holding that such limits do not *exist*.

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[94] 1951 S C 332 [A I R V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act, 1912.*

[95] 1951 S C 332 [A I R V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act, 1912.*

In this matter, the point of view taken by Mukherjea J., in the same case appears, with great respect, to be the sounder one. Discussing the principles laid down by the American decisions, he observed as follows[96]:

> "We are not concerned with the actual decisions in these cases. The decisions are to be valued in so far as they lay down any principles. The manner of applying the principles to the facts of a particular case is not at all material."

(o) Certain admitted limitations on power of legislative delegation.

It has already been mentioned above that in *the Delhi Laws Act case*[97] the Attorney-General contended that legislative power carries with it the power of delegation and that his contention found favour with two of the learned Judges in the case, Patanjali Sastri and Das JJ., who held that the Legislature had an unrestricted power of delegation. But it was conceded even by the Attorney-General and the Judges who agreed with him that the Legislature under a written Constitution was not competent to divest itself wholly of its legislative authority and create a parallel Legislature. Similarly, a Legislature could not delegate legislative authority in regard to a matter which did not fall within its legislative jurisdiction but pertained to an area allotted to another Legislature.[98] So also the Legislature cannot act beyond the limits imposed on its power by the Constitution.[99]

(p) Power to enact specific kind of legislation cannot be delegated.

Further, Bose J., drew a distinction between cases where the Legislature has the power generally to legislate on a particular topic and those in which the Legislature has been given the authority to enact a specific kind of leglislation. In the latter case, according to Bose J. the Legislature cannot delegate its power to another. For example, the Legislature has been given the power to impose restrictions on the Fundamental Rights enumerated in Art. 19, cl. (1). According to Bose J., the Legislature cannot in any way delegate its authority of enacting such restrictions. Similarly, the Legislature cannot delegate to any other body its power under Art. 22, cl. (7) (b) to fix the maximum period for which a person can be detained in custody under a law relating to preventive detention. Nor can the Legislature delegate to another its power under Art. 357, cl. (1) of conferring on the President the power of the Legislature of a State where a proclamation has been issued under ART. 356.[100]

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[96] 1951 S C 332 (400) [A I R V 38 C 56] : 1951 S C R 747 (984) (S C), *In re Delhi Laws Act, 1912*.

[97] 1951 S C 332 (370, 428) [A I R V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act, 1912*.

[98] *See* 1951 S C 332 (337, 338, 365, 393, 394) [A I R V 38 C 56] : 1951 S C R 747 (766, 867, 962) (S C), *In re Delhi Laws Act, 1912*.

[99] 1952 All 866 (868) [A I R V 39] : 1952 Cri L Jour 1676 : I L R (1953) 2 All 226 (F B), *Bhushan Lal* v. *State*.

(q) Express provision permitting delegation.

Article 357, cl. (1) expressly permits delegation of legislative authority in certain cases.

(r) Conferment of administrative authority.

The conferment of wide discretion on the Executive in regard to an administrative matter does not amount to a delegation of legislative power.[101] (See also ART. 14 NOTE 1.)

Similarly, the conferment of discretion on the Executive to enforce the law made by the Legislature is not a delegation of legislative power at all.[102] There is a basic distinction between the delegation of the power to make the law and the conferring of an authority and discretion as to its execution to be exercised under and in pursuance of the law.[103]

See also the undermentioned case.[104]

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100. 1951 S C 332 (437, 438) [A I R V 38 C 56] : 1951 S C R 747 (1114, 1115) (S C), *In re Delhi Laws Act, 1912.*

101. *See* 1952 Pat 359 (Pr 22, 25, 37) [A I R V 39] : I L R 31 Pat 493 (S B), *Atma Ram* v. *State of Bihar.* (There is no delegation of legislative powers if the choice of the officer is left by the statute to the State Government, and there is no constitutional limitation debarring the executive authorities from nominating such a person.)

1952 All 624 (Pr 9, 11) [A I R V 39 C 118] (DB), *Ghanshyamdass* v. *Gulab Chand,* (Power given to District Magistrate to grant or refuse permission to file suit for ejectment—No delegation of legislative power.)

1952 All 699 (Pr 11) [A I R V 39] : I L R (1953) 2 All 581 (DB), *Karam Chand Thapar and Bros.* v. *Vijay Anand.*

102. 1950 S C 27 (42, 43) (Pr 27) [A I R V 37 C 6] : 51 Cr L Jour 1383 : 1950 S C R 88 (SC), *Gopalan* v. *State of Madras.* (Preventive Detention Act, 1950, S. 3 is not invalid as delegating legislative power. It is not also bad as not providing any objective standard which the Court can utilize for determining whether the requirements of the law have been complied with — No such objective standard of conduct can be prescribed except as laying down conduct tending to achieve or to avoid a particular object.)

1954 Cal 591 (594) [A I R V 41 C 202] : 1954 Cri L Jour 1722 (D B), *Shri Krishna Sharma* v. *The State of West Bengal.* (Do.)

103. 1950 S C 27 (122) (Pr 246) [A I R V 37 C 6] : 51 Cri L Jour 1383 : 1950 S C R 88 (S C), *Gopalan* v. *State of Madras.*

104. (1949) 1 All E R 815 (824) : (1949) 2 K B 608, *Lewisham Borough Council* v. *Roberts.* (Denning C. J.—When a Minister is entrusted with *administrative,* as distinct from legislative, function, he is entitled to act by any authorised official of his department. The Minister is not bound to give his *mind* to the matter personally.)

1954 S C 465 (468) (Pr 10) [AIR V 41 C 112] : 1954 Cri L Jour 1322: 1955 S C R 380 (SC), *Hari Shankar Bagla* v. *M. P. State.* (Section 4 of Essential Supplies (Temporary Powers) Act, 1946, attacked on the ground that the authority on whom certain powers (viz., the Central Govt.) were conferred was authorized to further delegate its powers conferred by the Act—Contention overruled on the ground that the Act enumerated the classes of persons to whom the power could be delegated or sub-delegated by the Central Government : (1934) 293 U S 388 :

(s) Sub-delegation of power.

Where certain powers are conferred by an Act on the Government and the latter is empowered by the Act, to delegate its powers to certain classes of persons named by the Act, it cannot be said that the instrumentalities have not been selected by the Legislature itself.[105] (See also NOTE 11.)

(t) Legislative practice.

Whether delegation of a certain power to the Executive is valid may also be considered from the point of view of whether such delegation is in accordance with legislative practice.[106] Such practice may show that a certain matter has all along been treated as not being one of *legislative policy* but only as one of carrying out the policy.

See also NOTE 16 and ART. 246 NOTE 12.

(a) General principle established by Supreme Court decisions.

9. Essential legislative power cannot be delegated—Principles.—It has been seen in NOTE 8 that as a result of *the Delhi Laws Act case*,[1] read in the light of the later decisions in *Hari Shankar Bagla* v. *State of Madhya Pradesh*[2] and *Rajnarain Singh* v. *Chairman, Patna Administration Committee*,[3] it must be taken as established law now in India that the Legislature is not competent to delegate to the Executive or any other body its legislative authority in any *essential* matter, that is, in any matter which really constitutes matter of legislative *policy*.[4] It has also been seen in NOTE 8 that the majority view in *the Delhi Laws Act case*[5] has conceded the proposition that the Legislature can take the assistance of other

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79 Law Ed 446, *Panama Refining Co.* v. *Ryan* and (1934) 295 U S 495 : 79 Law Ed. 1570, *Schechter* v. *United States*, distinguished. 1938 A C 708, *Shannon* v. *Lower Mainland Dairy Product Board*, Rel. on.)

[105] 1952 All 866 (872) (Para 42) [AIR V 39] : 1952 Cri L Jour 1676 : I L R (1953) 2 All 226 (FB), *Bhushan Lal* v. *State*. (Section 4 of Essential Supplies (Temporary Powers) Act (1946) not *ultra vires*.)

[106] 1951 S C 332 (344) : [AIR V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act (1912)*. (But legislative practice must be clear and uniform.)

1955 N U C (Mad) 2421 [AIR V 42], *S. K. Velayutha Mudaliar* v. *District Munsiff of Virdhachalam, South Arcot*.

Article 245 — Note 9

[1] 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act, 1912*.

[2] 1954 S C 465 (468) (Pr 9) [AIR V 41 C 112] : 1954 Cri L Jour 1322 : 1955 S C R 380 (S C).

[3] 1954 S C 569 (574) (Pr 31) [AIR V 41 C 131] : 1955 S C R 290 (S C).

[4] 1954 Pat 371 (384) (Pr 46) [AIR V 41 C 132] : I L R 33 Pat 507 : 1954 Cri L Jour 1187 (F B), *State* v. *Kunja Behari Chandra*.

1955 Madh B 177 (178) [(S) AIR V 42 C 51] (DB), *Firm Kashiram Bihari Lal* v. *Badrilal*.

1954 Bom 397 (402) (Para 11) [AIR V 41 C 110] : I L R (1954) Bom 1278 (DB), *Chimanlal Dipchand* v. *State of Bombay*.

[5] 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act, 1912*.

bodies in the State in *subsidiary* matters[6] and that the cases in which such assistance can be taken would fall broadly into the two types of legislation known as conditional legislation and ancillary or subsidiary legislation.

(b) Principle explained.

In this connection the following passage from the judgment of Kania, C. J., in *the Delhi Laws Act case*[7] may be quoted :

> "A fair and close reading and analysis of all these decisions of the Privy Council, the judgments of the Supreme Courts of Canada and Australia without stretching and straining the words and expressions used therein lead me to the conclusion that while a Legislature, as a part of its legislative functions, can confer powers to make rules and regulations for carrying the enactment into operation and effect, and while a Legislature has power to lay down the policy and principles providing the rule of conduct, and while it may further provide that on certain data or facts being found and ascertained by an executive authority, the operation of the Act can be extended to certain areas or may be brought into force on such determination which is described as conditional legislation, the power to delegate legislative functions generally is not warranted under the Constitution of India at any stage. In cases of emergency, like war where a large latitude has to be necessarily left in the matter of enforcing regulations to the executive, the scope of the power to make regulations is very wide, but even in those cases the suggestion that there was delegation of 'legislative functions' has been repudiated. Similarly, varying according to the necessities of the case and the nature of the legislation, the doctrine of conditional legislation or subsidiary legislation or ancillary legislation is equally upheld under all the Constitutions. In my opinion, therefore, the contention urged by the learned Attorney-General that legislative power carries with it a general power to delegate legislative functions, so that the Legislature may not define its policy at all and may lay down no rule of conduct but that whole thing may be left either to the executive authority or administrative or other body, is unsound and not supported by the authorities on which he relies."

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[6] 1955 S C 25 (32) [(S) AIR V 42 C 7] : 1955 S C R 735 (S C), *Edward Mills Co.* v. *State of Ajmer*. (A Legislature cannot certainly strip itself of its essential functions and vest the same on an extraneous authority. The primary duty of law-making has to be discharged by the Legislature itself, but delegation may be resorted to as a subsidiary or ancillary measure.)

[7] 1951 S C 332 (345) [AIR V 38 C 56] : 1951 S C R 747 (791) (S C), *In re Delhi Laws Act, 1912*.

So also Mukherjea J., observed as follows in the same case[8] :

> " The essential legislative function consists in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct. It is open to the Legislature to formulate the policy as broadly and with as little or as much details as it thinks proper and it may delegate the rest of the legislative work to a subordinate authority who will work out the details within the framework of that policy. 'So long as a policy is laid down and a standard established by a statute, no constitutional delegation of legislative power is involved in leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply.' vide *Schechter Poultry Corp.* v. *United States.*[9]"

The principle underlying the prohibition against delegation of legislative power has been expressed by Cooley in his CONSTITUTIONAL LIMITATIONS, VOL. 1, at p. 224[10] in these words :

> " One of the settled maxims in constitutional law is that the power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.".

The above passage explains the principle underlying the general rule, namely, that legislative power cannot be delegated. The principle on which *exceptions* to the general rule are permitted and the extent to which such exceptions are permitted have been explained by Crawford in his book on THE CONSTRUCTION OF STATUTES, pp. 25, 26,[11] as follows :

> " Legislative power has been delegated, as general rule, not so often as an effort to break down the triparte theory of the separation of powers, but from necessity and for the sake of convenience.

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[8] 1951 S C 332 (400) [AIR V 38 C 56] : 1951 S C R 747 (982) (S C), *In re Delhi Laws Act, 1912.*

[9] (1935) 79 Law Ed 1570 : 295 U S 495.

[10] Constitutional Limitations, Vol. 1, Page 224. (Quoted in A I R 1951 S C 332 (352) : 1951 S C R 747 (818) (S C).)

[11] Quoted in 1951 S C 332 (381) [AIR V 38 C 56] : 1951 S C R 747 (920) (SC), *In re Delhi Laws Act, 1912.*

More and more with a social system steadily becoming increasingly complex, the Legislature has been obliged in order to legislate effectively, efficiently and expeditiously, to delegate some of its functions, not *purely legislative in character*, to other agencies, particularly to administrative officials and boards. *Most prominent among the powers thus delegated have been the power to ascertain facts, and the power to promulgate rules and regulations.* Many of the other delegated powers, upon analysis, fall within one of these two major or basic classifications."

"So far, however, as the delegation of any power to an executive official or administrative board is concerned, the Legislature must declare the policy of the law and fix the legal principles which are to control in given cases and must provide a standard to guide the official or the board empowered to execute the law. This standard must not be too indefinite or general. It may be laid down in broad general terms. It is sufficient if the Legislature will lay down an intelligible principle to guide the executive or administrative official . . . . From these typical criterions, it is apparent that the Courts exercise considerable liberality towards upholding legislative delegations, if a standard is established. *Such delegations are not subject to the objection that legislative power has been unlawfully delegated. The filling in of mere matters of detail within the policy of, and according to, the legal principles and standards established by the Legislature is essentially ministerial rather than legislative in character*, even if considerable discretion is conferred upon the delegated authority. In fact, the method and manner of enforcing a law must be left to the reasonable discretion of administrative officers under legislative standards."

In *Harishankar Bagla* v. *M. P. State*[12] the Supreme Court observed as follows:

"It was settled by the majority judgment in the *Constitution of India and Delhi Laws Act, 1912 etc.*,[13] that essential powers of legislation cannot be delegated. In other words, the Legislature cannot delegate its function of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. The Legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law. The essential legislative function consists in the determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct."

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[12] 1954 S C 465 (468) [AIR V 41 C 112] : 1954 Cri L Jour 1322 : 1955 S C R 380 (S C).

[13] 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (S C).

(c) Basis of view: Construction of Constitution.

The basis of the above view has been expressed by Mahajan, J., as follows[14]:

> "The question can be posed thus: Why is delegation peculiarly a content of legislative power and not of judicial power? In my judgment, it is a content of none of the three State powers, legislative, judicial or executive. It is, on the other hand, incidental to the exercise of all power inasmuch as it is necessary to delegate for the proper discharge of all these three public duties. No public functionary can himself perform all the duties he is privileged to perform unaided by agents and delegates, but from this circumstance it does not follow that he can delegate the exercise of his judgment and discretion to others."

Thus, two principles are involved:

(i) the Legislature having been entrusted by the Constitution with the authority to make laws cannot devolve the *essence* of that authority on any other body; and

(ii) the Legislature can take the assistance of other departments or bodies in carrying out its duties, in regard to *subsidiary matters*.

Thus, a distinction is to be made between *essential* legislative power and ancillary or subsidiary legislative power. The determination of legislative policy and its formulation into a binding rule of conduct constitute the essence of legislative power and this power cannot be delegated by the Legislature to any other authority. But *subsidiary* matters which are necessary for effective legislation can be delegated.[15]

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14. 1951 S C 332 (386) [AIR V 38 C 56] : 1951 S C R 747 (937, 938) (S C), *In re Delhi Laws Act, 1912.*

15. 1955 S C 25 (32) (Para 17) [(S) AIR V 42 C 7] : 1955 S C R 735 (S C), *Edward Mills Co.* v. *State of Ajmer.*

1951 S C 332 (338, 400) [AIR V 38 C 56] : 1951 S C R 747 (767, 982) (S C), *In re Delhi Laws Act, 1912.* (See observations of Kania C, J. and Mukherjea J. at the above pages.)

(1943) 88 Law Ed 834 (848) : 321 U S 414 (424, 425), *Yakus* v. *United States.* (The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct, and these essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective.)

(1942) 87 Law Ed 1774 (1788) : 320 U S 81 (104), *Hirabayashi* v. *United States.* (Do.)

[*See also* 1953 Nag 58 (63) (Pr 26) [A I R V 40 C 25] : I L R (1952) Nag 770 : 1953 Cri L Jour 481 (DB), *Hiralal* v. *State.* (The provisions of Ss. 99 & 100, Government of India Act, 1935, which correspond to Arts. 245 & 246, Constitution of India, did not confer power to delegate essential legislative functions, and the enactment of law such as the India (Central Government and Legisla-

The above principles are themselves based on two well-recognized principles as to construction of statutes, namely,

(a) if a statute directs that certain acts shall be done in a specified manner or by certain persons, then performance in any other manner than that specified or by any other persons than those named, is impliedly prohibited,[16] and

(b) everything necessary to the exercise of a power is implied in the grant of the power.[17]

The combined operation of these two principles results in the position that while the Legislature can avail itself of the assistance of other bodies in the State, in the discharge of its duties in regard to subsidiary matters, it cannot divest itself of its essential legislative function in the sense of the determination of legislative policy and vest the same in an extraneous authority. In other words, the primary or essential duty of law-making has got to be discharged by the Legislature itself. Delegation may be resorted to only as a secondary or ancillary measure.[18]

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ture) Act, 1946, made no difference as to the nature and quality of the powers conferred by those sections.)

(1928) 72 Law Ed 624 (629) : 276 U S 394 (406), *Hampton, J. R. & Co.* v. *United States.* (The field of Congress involves all and many varieties of legislative action and Congress has found frequently necessary to use officers of the executive branch within defined limits to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution even to the extent of providing for penalizing a breach of such regulations.)]

16. Crawford's Statutory Construction, Page 334. [Quoted by Mahajan J. in *the Delhi Laws Act case*, 1951 S C R 747 (947) : AIR 1951 S C 332 (389) (SC).]

17. 1955 S C 25 (32) (Para 17) [(S) A I R V 42 C 7] : 1955 S C R 735 (S C), *Edward Mills Co.* v. *State of Ajmer.* (As pointed out by O'Connor J. of the High Court of Australia in *Baxter* v. *Ah. Way*, (1909) 8 C L R 626 at p. 637 (Aus.), when a Legislature is given plenary power to legislate on a particular subject, there must always be an implied power to make laws incidental to the exercise of such power. It is a fundamental principle of constitutional law that everything necessary to the exercise of a power is included in the grant of the power. Legislature cannot strip itself of its essential functions. Delegation may be resorted to as a subsidiary or ancillary measure.)

(1909) 8 C L R 626 (637) (Aus), *Baxter* v. *Ah. Way.* (Per O'Connar J. — Quoted by Mukherjea J. in 1951 S C R 747 (974) : AIR 1951 S C 332 (397) (SC).)

18. 1955 S C 25 (32) (Pr 17) [(S) A I R V 42 C 7] : 1955 S C R 735 (SC), *Edward Mills Co.* v. *State of Ajmer.*

1951 S C 332 (397) [A I R V 38 C 56] : 1951 S C R 747 (974) (SC), *In re Delhi Laws Act, 1912.*

('55) 1955 Andhra W R 754 (767), *Veerraju* v. *District Munsif of Ramachandrapuram.* (While the Legislature cannot abdicate its general law-making powers it may authorise others to do things which it might properly do, but which it cannot conveniently or properly perform. It is not every grant of power by the Legislature involving the exercise of discretion and judgment that amounts to a delegation of legislative power. A legislative body may,

(d) Theory of separation of powers.

As already mentioned, the above principles relating to delegated legislation are based on the application of well-known principles to the *construction* of the Constitution and not on any abstract theories like the theory of separation of powers under the American Constitution. It has already been seen in NOTE 4 that by adopting the parliamentary system of executive, the Indian Constitution has shown its rejection of the *strict* theory of separation of powers. But at the same time, the Constitution has clearly made a threefold division of functions to be discharged primarily by three separate departments of State. In *the Delhi Laws Act case*[19] Kania, C. J., observed as follows about the Legislature under the Indian Constitution:

> "While the Constitution creates the Parliament and although it does not in terms expressly vest the legislative powers in the Parliament exclusively, the whole scheme of the Constitution is based on the concept that the legislative functions of the Union will be discharged by the Parliament and by no other body. The essential of the legislative functions, namely, the determination of the legislative policy and its formulation as a rule of conduct, are still in the Parliament or the State Legislatures, as the case may be, and nowhere else."

(e) Delegatus non potest delegare.

As seen in NOTE 8 (d), the prohibition against legislative delegation under the American Constitution is based partly on the doctrine of separation of powers and partly on the maxim *delegatus non potest delegare*. It was held in regard to the Indian and colonial Legislatures constituted under Acts of the British Parliament that such Legislatures were not mere delegates or agents of the British Parliament and had, within their allotted spheres, plenary powers of legislation of the same nature and extent as those of the British Parliament.[20] After the inauguration of the new Constitution there is no question of the Indian Legislature being a delegate of the British Parliament. But the question has been raised whether the Legislature can be regarded as the agent or delegate of the electorate or the

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after declaring a policy and after fixing a primary standard, confer upon the executive or administrative officers the power to prescribe the administrative rules and regulations to promote the purpose and spirit of the legislation and to carry it into effect; and the action of the Legislature in giving such rules and regulations the force and effect of laws does not violate the constitutional inhibition against delegating the legislative function.)

[19] 1951 S C 332 (346) [A I R V 38 C 56] : 1951 S C R 747 (796) (S C), *In re Delhi Laws Act, 1912*.

[20] ('78) I L R 4 Cal 172 : 5 Ind App 178 (193) (PC), *Empress* v. *Burah*.
1933 P C 16 (18) : [AIR V 20] (PC), *Croft* v. *Dunphy*.
(1885) 10 App Cas 282 (290) : 54 L J P C 7 (10), *Powell* v. *Appollo Candle Co.*
(1883) 9 App Cas 117 (132) : 53 L J P C 1, *Hodge* v. *The Queen*.

people as a whole. In *the Delhi Laws Act case*[21] Fazl Ali, J., gave reasons for holding that the Legislature was not such agent. But Fazl Ali, J., was disposed to be liberal in according to the Legislature large powers of delegation. But Mukherjea, J., who held that the Legislature could not delegate essential legislative power, also took the view that the maxim *delegatus non potest delegare* did not apply to the Legislature.[22] But the non-applicability of the maxim to the Legislature does not affect the principle that a body entrusted with a public function under the Constitution cannot devolve that function on another body.

(f) Sovereignty of Legislature.

The next theory that has been canvassed in connection with the question of delegated legislation is the theory of the sovereignty of the Legislature. For a discussion of this theory in relation to the Indian Legislature, see NOTE 3. As seen in that Note the Legislature under the Indian Constitution is not a sovereign body like the British Parliament, the validity of whose laws cannot be questioned in a Court. Nevertheless it was argued in *the Delhi Laws Act case*[23] that within its allotted sphere the Indian Legislature had plenary power of legislation of the same nature and extent as those of the British Parliament. On the basis of this argument it was contended that the Indian Legislature had unlimited power of delegation of its legislative authority just like the British Parliament. As seen in NOTE 8 (f) this argument was rejected by the majority of the Judges in *the Delhi Laws Act case*[24] and that case must be treated as having definitely established the principle that the Indian Legislature cannot claim plenary and unrestricted powers of delegation like the British Parliament. In other words, the plenary character of the legislative powers of the Indian Legislature in regard to its own allotted sphere does not mean that it can delegate to another authority the essence of legislative power, although it can take the assistance of subordinate agencies in regard to subsidiary matters and delegate its functions to that extent.

(g) Abdication or self-effacement by Legislature.

It has already been seen in NOTE 8 (j) that in *the Delhi Laws Act case*[25] it was conceded by the Attorney-General and the minority

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[21] 1951 S C 332 (349) [AIR V 38 C 56]: 1951 S C R 747 (803) (SC), *In re Delhi Laws Act, 1912.*

[22] 1951 S C 332 (395) [AIR V 38 C 56] : 1951 S C R 747 (967) (SC), *In re Delhi Laws Act, 1912.* (Per Mukherjea J.)

[23] 1951 S C 332 (338) [A I R V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[24] 1951 S C 332 (346 (Kania C. J.), 355 (Fazl Ali J.), 372 (Mahajan J.), 395 (Mukherjea J.), 437, 438 (Bose J.)) [AIR V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[25] 1951 S C 332 (345) [A I R V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act, 1912.*

Judges who agreed with him that the widest powers of delegation to which the Legislature might be held to be entitled would not allow of the Legislature abdicating its functions and creating a parallel Legislature. But it was argued that short of such complete self-effacement the Legislature could delegate its law-making authority to any other body. As seen already in NOTE 8 this argument was rejected by the majority of the Judges in *the Delhi Laws Act case.*[26] It was also pointed out by Mukherjea, J., that the question whether the Legislature could transfer the entirety of its powers to another body or to a body over which it would have no control and whose authority it could not revoke was practically beside the point when considering the question of validity of particular pieces of legislation in which the Legislature had purported to delegate legislative authority to the Executive or any other body, because in such a case the wider question of the Legislature parting with the whole of its authority in the above manner does not arise at all. Kania, C. J., and Mahajan, J., also pointed out that abdication and self-effacement by the Legislature could be total as well as partial and delegation of legislative authority could be open to the objection of "abdication" even though there was no total self-effacement or creation of a parallel legislative body by the Legislature.[27]

(h) Control over subordinate agency.

Similarly, it was argued in *the Delhi Laws Act case*[28] that so long as the Legislature retained its control over the subordinate authority on which it conferred law-making power and so long as the Legislature could revoke the authority conferred by it, it could not be said to have abdicated its function. This argument was also rejected by the majority of the Judges according to whom the test of the Legislature retaining control over the subordinate agency and having the power to revoke its authority at any time it pleases, is not a conclusive test of the competency of the Legislature to delegate its power to another body, although the reservation of such residuary power in the hands of the Legislature is a necessary and indispensable element even in those limited cases in which the Legislature should be held to have the power of delegation even according to the majority of the Judges in *the Delhi Laws Act case.*[29] In this connection Mukherjea, J., pointed out that the test of the validity of delegation by the Legislature is not the subordinateness of the agency to which the power is delegated but the subordinateness of *legislation.*[30] In other words, it is the character of the *matter* on which the subordinate agency is empowered to legislate that determines the validity of the delegation and not the fact that the agency on which power is conferred continues to be subordinate and subject to the control of the Legislature.

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[26] 1951 S C 332 [A I R V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act, 1912.*

[27] 1951 S C 332 (345, 378) [A I R V 38 C 56] : 1951 S C R 747 (793, 912) (S C), *In re Delhi Laws Act, 1912.*

[28] 1951 S C 332 (345) [A I R V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act, 1912.*

[29] 1951 S C 332 [A I R V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act, 1912.*

(i) "Legislation", meaning of

When it is said that "legislative power" cannot be delegated, what is meant is only that legislative power in the sense of determining the policy and formulating it as a binding rule of conduct cannot be delegated. Where the Legislature lays down the policy and the standard, the task of filling in details and other subsidiary matters may be left to the Executive or other body. But it is obvious that the Legislature itself can also fill in the details and make the legislation complete and self-sufficient both in matters of principle as well as of details.[31] Thus, the work of filling in details and other subsidiary matters can also be a part of the process of law-making, although it is of a subsidiary and ancillary character which may be relegated to other hands. In this view the term 'law' as used in ARTS. 245 and 246 must be taken to refer to *both* matters of principle and policy as well as subsidiary matters and matters of detail.[32] Otherwise, the anomalous result will be reached that although the Legislature itself has enacted a certain matter it is not 'law' within the meaning of the above articles because it is concerned with details or subsidiary matters. The difference between the two kinds of matter is, therefore, clearly not that one of them is legislation and the other is *not* legislation. The difference only consists in the fact that in the one case the matter relates to the essence of legislation, while in the other it relates to subsidiary matters and not the essence of legislation. In this view, it would appear that it would not be correct to confine the meaning of legislative function to what may be called the *essential* part of it. But, at the same time, when the essential part of the legislative function is not performed by the Legislature but delegated to another body, it cannot be said to "make a law" within the meaning of ARTS. 245 and 246.[33]

(j) Principle as settled by *Delhi Laws Act case* approximates to American theory.

The difference between the British and the American theories as to delegated legislation has been discussed in NOTE 8 (e). It will be seen that the law as settled in India by the majority view in *the Delhi Laws Act case*[34] as explained in NOTE 8 approximates to the American theory, as according to it, the Legislature has no power of delegation except in regard to subsidiary or ancillary matters.

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[30] 1951 S C 332 (399, 400) [A I R V 38 C 56] : 1951 S C R 747 (981, 982) (S C), *In re Delhi Laws Act, 1912.*

[31] (1825) 6 Law Ed 253 (263) : 10 Wh 1, *Wayman* v. *Sauthard.* (Legislature can delegate to others powers which it may itself exercise though it cannot delegate powers which are strictly and exclusively legislative.)

[32] *See* 1951 S C 332 (369) [AIR V 38 C 56] : 1951 S C R 747 (882) (SC), *In re Delhi Laws Act, 1912.* (Per Patanjali Sastri J.)

[33] 1951 S C 332 (346, 347) [AIR V 38 C 56] : 1951 S C R 747 (798) (SC), *In re Delhi Laws Act, 1912.*

(k) Essential and subsidiary matters — No satisfactory tests of distinction.

What constitutes an essential matter or a subsidiary matter has, however, not been defined in general terms so as to make the definition applicable to all the cases.[35] As long ago as 1825, Marshall C. J., of the Supreme Court of America observed as follows in *Wayman* v. *Southard*[36]:

> "The line has not been exactly drawn which separates those important subjects which must be entirely regulated by the Legislature itself from those of less interest in which a general provision may be made and power given to those who are to act under such general provisions to fill up the details."

The above statement seems to be as true to-day as it was when it was made more than 125 years ago.

(l) Duty of Court in applying principles.

Hence, decided cases are often found to be irreconcilable with each other. But this only means that when a question is raised as to the validity of delegated legislation in a particular case the *Court* will have to decide on a consideration of the legislation as a whole whether the delegation transgresses the permissible limits or whether the Legislature has laid down the policy and the standard with sufficient definiteness so as to validate the delegation. As Mukherjea, J., has pointed out in *the Delhi Laws Act case*,[37] the decisions ought to be valued in so far as they lay down principles and the differences noted in regard to the manner of applying those principles, should be treated as of no importance. So far as the broad principles are concerned they may be treated as settled in India as a result of the majority view in *the Delhi Laws Act case*.[38] These have already been explained. According to these principles the Legislature cannot part with its essential legislative function which consists in declaring its policy and making it a binding rule of conduct. The policy may be particularised in as few or as many words as the Legislature thinks proper and it is enough if an intelligent guidance is given to the subordinate authorities. The Court can interfere if no policy is discernible at all or the delegation is of such an indefinite character as to amount to abdication. But as the discretion vests with the Legislature in determining whether there is a necessity for delegation or not, the exercise of such discretion is not to be disturbed by the Court except in clear cases of abuse.[39]

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[34] 1951 S C 332 (401) [AIR V 38 C 56]: 1951 S C R 747 (935) (SC), *In re Delhi Laws Act, 1912.*

[35] *See* (1915) 59 Law Ed 552 (560) : 236 U S 230, *Mutual Film Corp.* v. *Industrial Com.* (While administration and legislation are quite distinct powers, the line which separates exactly their exercise is not easy to define in words. It is best recognized in illustrations.)

[36] (1825) 6 Law Ed 253 (263) : 10 Wh 1 (43).

[37] 1951 S C 332 (400) [A I R V 38 C 56] : 1951 S C R 747 (984) (S C), *In re Delhi Laws Act, 1912.*

[38] 1951 S C 332 [A I R V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

(m) Significance of principle settled by Delhi Laws Act case: Check on excessive growth of executive power.

From the above it is clear that the ultimate decision in case of dispute whether the Legislature has unconstitutionally delegated a matter of policy to another rests with the Courts, under the law as settled in *the Delhi Laws Act case*[40] in India. This tallies with the constitutional position in America also, although it differs radically from the position in England where Parliament itself is the ultimate authority to decide whether a delegation is proper or not and its decision is beyond any question in a Court of law. The view taken by the majority in *the Delhi Laws Act case*[41] and the power it ensures to the Court to decide whether delegation of legislative power in any case exceeds the permissible limits according to the constitutional principles thus guarantees that the growth of executive power caused by administrative necessities will not be an uncontrollable one. As already seen in NOTE 8, even in England where the theory of Parliamentary supremacy prevails, excessive delegation of legislative power to the executive is not looked upon with favour and measures have been taken to check such excessive delegation.

(n) Some examples of delegated legislation.

As already seen in NOTE 8, the two types of legislation known as conditional legislation and subsidiary or ancillary legislation constitute categories of legislation in which the element of delegation of legislative power has always been held to be unexceptional. The delegation in such cases is covered by the principle of delegation of *ancillary* matters discussed above. (For fuller discussion of these two types of legislation, see NOTES 10 and 11.) Similarly, a power of adaptation or modification, within restricted limits, of existing laws may be validly conferred on the Executive. It has been seen in NOTE 8 that

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39. 1954 Bom 397 (402) (Pr 11) [A I R V 41 C 110] : I L R (1954) Bom 1278 (DB), *Chimanlal Dipchand* v. *State of Bombay*. (Once the policy is laid down and is made clear in the Act itself, it would not be for the Court to consider the extent and the nature of the delegation; that must be left to the discretion of the Legislature. The Court will not and cannot say that the Legislature should have delegated up to this point and not beyond it. In deciding whether particular piece of legislation is bad on the ground that it is delegated legislation, it is not open to the Courts to consider that the delegated authority may act arbitrarily and capriciously and not in furtherance of the policy laid down by the Legislature.)

40. 1951 S C 332 (400, 401) [A I R V 38 C 56] : 1951 S C R 747 (984, 985) (SC), *In re Delhi Laws Act, 1912.*

41. 1951 S C 332 (400, 401) [A I R V 38 C 56] : 1951 S C R 747 (984, 985) (SC), *In re Delhi Laws Act, 1912.*

according to the majority decision in *the Delhi Laws Act case*[42] such a power of adaptation annexed to a power to extend a law to a certain local area is valid. But the Executive cannot be empowered to alter the *policy* of an Act.[43] (See NOTE 8.) The power to *repeal* an Act is not also capable of delegation by the Legislature.[44] A power conferred on municipal and other local authorities to make rules and by-laws about local affairs, is valid; such rules and by-laws come under the category of subsidiary legislation.[45] A power conferred on Courts to enact rules of procedure is another example of the power to authorise subsidiary legislation.[46]

As to delegation of power to *extend* the duration of a temporary Act or to determine the termination or commencement of an Act, see NOTE 10.

(o) Power to repeal existing w.

As mentioned already (sub-heading (n) in this Note), to repeal or abrogate an existing law is the exercise of *essential* legislative

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42. 1951 S C 332 [A I R V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act, 1912.*

43. 1954 S C 569 (574) [A I R V 41 C 131] : 1955 S C R 290 (SC), *Rajnarain Singh* v. *Chairman, P. A. Committee.*

1951 S C 332 (346) [A I R V 38 C 56] : 1951 S C R 747 (795) (SC), *In re Delhi Laws Act, 1912.*

1949 F C 175 (178) (Pr 7) [AIR V 36 C 30] : 1949 F C R 595 : I L R 28 Pat 703 : 50 Cri L Jour 897 (FC), *Jatindra Nath Gupta* v. *Province of Bihar.* (Power to modify an Act of a legislature, without any limitation on the extent of the power of modification, is undoubtedly a legislative power.)

[*See* 1947 F C 32 (35) (Pr 7) [A I R V 34 C 8] : 1947 F C R 116 : I L R 26 Pat 442 : I L R (1947) Kar F C 72 (FC), *Chatturam* v. *I. T. Commr., Bihar.* (The power to modify an Act is legislative act.)]

44. 1954 S C 465 (469) [A I R V 41 C 112] : 1954 Cri L J 1322 : 1955 S C R 380 (SC), *Hari Shankar Bagla* v. *M. P. State.*

1951 S C 332 (408) (Prs. 275, 276) [AIR V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act, 1912.*

1953 Nag 58 (64, 68) (Prs. 33, 57) [AIR V40 C 25] : I L R (1952) Nag 770 : 1953 Cri L Jour 481 (DB), *Hiralal Sutwala* v. *The State.* (The Essential Supplies (Temporary Powers) Act, 1946, except S. 6 is valid. Section 6 is *ultra vires* and invalid because it delegates an essential legislative function, i. e., power to repeal, to the Central Government.)

1952 Vind Pra 39 (40, 41) (Pr 9) [AIR V 39 C 19], *Abadijan* v. *Otermal.*

45. 1951 All 181 (192) (Pr 49) [AIR V 38 C 20] : I L R (1952) 1 All 376 : 52 Cri L Jour 333 (F B), *Ram Kishan* v. *State.* (Categories within permissible limits: (a) Conditional legislation, (b) Power to make rules and regulations to carry out law; (c) functions of an administrative character; (d) Rule-making power of municipalities and local bodies.)

[*See* 1951 All 674 (697) (Pr 121) [AIR V 38 C 182] : I L R (1952) 2 All 46 (F B), *Suryapal Singh* v. *U. P. Govt.* (Categories within permissible limits: (a) Conditional legislation; (b) Adaptation or modification within restricted limits; (c) Power of local authority to make rules for local purposes; (d) Supplementary legislation to give effect to broad principles laid down in Act.)]

46. (1825) 6 Law Ed 253 (263) : 10 Wheat 1 (46), *Wayman* v. *Southard.*

power.[47] Hence, the Legislature cannot delegate such power.[48] But the repeal of a statute means that the statute is wiped out from the statute book. Where the effect of an Act is not to *repeal* a statute in this sense but only to *by-pass* it in certain cases, the above principle does not apply.[49] Moreover, where an Act empowers a certain body to exercise certain powers and provides that orders passed by such body in the exercise of its powers shall be valid although they may be inconsistent with any existing provision of law, the repeal (assuming that to the extent of the repugnancy the previous law stands repealed) is made by the *Legislature* itself and not by the body on whom it has conferred the powers.[50]

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[47] **1951 S C 332 (408)** [AIR V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act, 1912.*
1954 S C 465 (469) [AIR V 41 C 112] : 1954 Cri L Jour 1322 : 1955 S C R 380 (S C), *Hari Shankar Bagla* v. *M. P. State.*
1952 All 866 (872) (Pr 43) [AIR V 39] : I L R (1953) 2 All 226 : 1952 Cri L Jour 1676 (F B), *Bhushan Lal* v. *State.* (S. 6 of Essential Supplies (Temporary Powers) Act (1946) is *ultra vires* — So far as this particular point is concerned, however, this decision must be treated as overruled by the Supreme Court in *Harishankar* v. *M. P. State,* A I R 1954 S C 465 (469), in which it was held that S. 6 of the Essential Supplies (Temporary Powers) Act, 1946 is not *ultra vires* on this ground, as the repeal under that section is made by the *Legislature* itself.)
1953 Nag 58 (64, 68) [AIR V 40 C 25] : 1953 Cri L Jour 481 : I L R (1952) Nag 770 (DB), *Hiralal Sutwala* v. *The State.* (Do.)

[48] 1951 S C 332 (408) [AIR V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act, 1912*
1954 S C 465 (469) [AIR V 41 C 112] : 1954 Cri L Jour 1322 : 1955 S C R 380 (S C), *Hari Shankar Bagla* v. *M. P. State.*
1952 All 866 (872) (Pr 43) [AIR V 39] : I L R (1953) 2 All 226 : 1952 Cri L Jour 1676 (FB), *Bhushan Lal* v. *State* (S. 6 of Essential Supplies (Temporary Powers) Act (1946) is *ultra vires*—So far as this particular point is concerned, however, this decision must be treated as overruled by the Supreme Court in *Harishankar* v. *M. P. State,* AIR 1954 S C 465 (469) in which it was held that S. 6 of the Essential Supplies (Temporary Powers) Act, 1946, is not *ultra vires* on this ground, as the repeal under that section is made by the *Legislature* itself.)
1953 Nag 58 (64, 68) [AIR V 40 C 25] : 1953 Cri L Jour 481 : I L R (1952) Nag 770 (DB), *Hiralal Sutwala* v. *The State.* (Do.)

[49] 1954 S C 465 (469) [AIR V 41 C 112] : 1954 Cri L Jour 1322 : 1955 S C R 380 (S C), *Hari Shankar Bagla* v. *M. P. State.* (Section 6 of the Essential Supplies (Temporary Powers) Act, 1946, does not either expressly or by implication repeal any of the provisions of pre-existing laws; neither does it abrogate them. Those laws remain untouched and unaffected so far as the statute book is concerned. The object of S. 6 is simply to by-pass them where they are inconsistent with the provisions of the Act or the orders made thereunder. In other words, the orders made under S. 3 would be operative in regard to the essential commodity covered by the Textile Control Order wherever there is repugnancy in this Order with the existing laws and to that extent the existing laws with regard to those commodities will not operate. By-passing a law does not necessarily amount to repeal or abrogation of that law.)
1955 Nag 246 (247, 254) (Prs. 3, 40) [(S) AIR V 42 C 64] (FB), *Balkishan* v. *Totaldas.* (Section 6 of the C. P. and Berar Regulation of Letting of Accommodation Act (11 of 1946) is not invalid as conferring power of repeal on executive—It is not quite accurate to regard a provision like S. 6 as giving to the executive a "power of repeal"—The section does not authorise the executive to repeal any existing law—The existing law remains on the Statute book — It is not the case that if the impugned provision itself is repealed, the relevant provision of the existing law will have to be enacted—All that happens by

Where the Legislature has passed an Act and empowered a responsible authority to extend that Act to a specified locality with such modifications and alterations as the necessities of the situation may require and to repeal those existing laws only which would impliedly stand repealed when the Act is so extended, the delegation of the power to repeal existing laws in these circumstances cannot be said to be *ultra vires.* A repeal of this nature is not in reality a repeal by any act of the *delegate* but by the act of the Legislature itself.[51]

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virtue of the impugned provision is that an order made under the enabling section is allowed to operate within the field covered by it, notwithstanding any repugnancy with the law already in existence in that field. In short, the existing law still prevails as before except when it clashes with an inconsistent order in the field demarcated by the enabling provision—Dissenting from AIR 1953 Nag 58.)

1952 Pat 220 (222) [AIR V 39 C 55 (22)] : I L R 31 Pat 203 : 1952 Cri L Jour 710 (S B), *Mohd. Anzar Husnain* v. *State of Bihar.* (Section 6 of the Essential Supplies (Temporary Powers) Act, 1946 is not invalid. In so far as an order under S. 3 may be inconsistent with any other existing legislation the effect of the order would not be to *repeal* that legislation but the order itself would be valid. S. 6 is only a saving section.)

1951 Cal 120 (125) (Pr 41, 42) [AIR V 38 C 30c] : I L R (1952) 2 Cal 296 : 52 Cri L Jour 934 (FB), *Ramananda* v. *The State.* (Section 6, Essential Supplies (Temporary Powers) Act, 1946 is not invalid—It only provides that the orders made under S. 3, will override existing law.)

[50] 1954 S C 465 (469) (Pr 12) : [A I R V 41 C 112] : 1954 Cri L Jour 1322 : 1955 S C R 380 (S C), *Hari Shankar Bagla* v. *M. P. State.* (Even assuming that to the extent of a repugnancy between an order made under S. 3 of the Essential Supplies (Temporary Powers) Act, 1946, and the provisions of an existing law, the existing law stands repealed by implication, the repeal is not by any act of the delegate, but the repeal is by the legislative act of the Parliament itself. By enacting S. 6 Parliament itself has declared that an order made under S. 3 shall have effect notwithstanding any inconsistency in the order with any enactment other than this Act. This is not a declaration made by the delegate but by the Legislature which has declared its will that way in S. 6.) [*See also* 1955 All 554 (556) [(S) AIR V 42 C 160] (DB), *Ziaullah Khan* v. *State of Uttar Pradesh.*]

[51] 1955 All 554 (556) [(S) AIR V 42 C 160] (DB), *Ziaullah Khan* v. *State of Uttar Pradesh.* (Held, that the modifications made by the Notifications Nos. 3168 and 3169 while extending the U. P. Act, I of 1951, to Rampur district did not amount to an alteration affecting the substance, that is, the essential nature of the impugned enactment. Nor the provision regarding the repeal of certain laws already in force in the former territories of Rampur unconstitu-

(p) Power to create offences.

The power to create offences is legislative and not executive, but rule-making power of a police or municipal nature may be conferred and this power may include the power to impose penalties. (See under NOTE 5.)

(q) Power of taxation.

The power of taxation is also *legislative* (see ART. 265) but power may be conferred on Municipality, etc., to impose taxes, etc.[52]

(r) Power to constitute Courts and Tribunals.

It is only a legislative enactment or a rule having statutory authority that can constitute a *Court*[53] or invest a Judge with authority to determine matters outside his ordinary jurisdiction.[54] The creation of an authority distinct from a *Court* is not a legislative function.[55] Thus, an Election Commissioner who performs his duties as a *persona designata* and not as a *Court* may be constituted by rules made by the executive Government under authority conferred by statute and the statute conferring such rule-making power will not be invalid on the ground of its being an unconstitutional delegation of legislative power.[56]

(a) General.

10. Conditional legislation.—As seen in NOTE 8 (k), the type of legislation known as conditional legislation is not affected by the prohibition against delegation of legislative power, and there was practically no controversy in *the Delhi Laws Act case*[1] about the validity of this kind of legislation. In fact, *the Delhi Laws Act case*[2] itself constitutes an important illustration of the validity of conditional legislation. No doubt, there were sharp differences of opinion among the Judges of the Supreme Court in that case as to the

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tional; for; the notification in repealing the Acts does nothing more than express what was implicit in the situation : A I R 1951 S C 332, Explained and Distinguished.)

[52] 1955 Bom 185 (Pr 6) [(S) AIR V 42 C 49] (DB), *Hirabhai Ashabhai* v. *State of Bombay*. (Section 169 of Bombay Municipal Corporation Act (1888) empowering levy of water charges by measurement is not *ultra vires* as unconstitutional delegation of legislative power.)

[53] ('55) 1955 Andhra W R 754 (767), *Veerraju* v. *District Munsif of Ramachandrapuram.*

[54] ('55) 1955 Andhra W R 754 (767), *Veerraju* v. *District Munsif of Ramachandrapuram.*

[55] ('55) 1955 Andhra W R 754 (767), *Veerraju* v. *District Munsif of Ramachandrapuram.*

[56] ('55) 1955 Andhra W R 754 (767), *Veerraju* v. *District Munsif of Ramachandrapuram.* (Rules framed by Govt. under S. 112 (2) (i) of Madras Village Panchayats Act (X of 1950), constituting Election Commissioner to hear election disputes under the Act are valid.)

1955 NUC (Mad) 2421 [AIR V 42], *Velayutha Mudaliar* v. *Dist. Munsiff of Vridhachalam South Arcot.* (Do.)

Article 245 — Note 10

[1] 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act, 1912.*

[2] 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act, 1912.*

validity of the enactments which were impugned therein on the ground that they unconstitutionally delegated legislative power. But this was not due to any difference of opinion as to the broad proposition that conditional legislation is valid. The learned Judges, who held the impugned enactments to be *ultra vires* (partially or wholly), base their view not on the ground that conditional legislation is invalid but on the ground that the sweeping character of the powers conferred on the Executive by the particular enactments in question exceeded the limits of the powers that could be conferred even under conditional legislation. For details of the matters decided by *the Delhi Laws Act case*,[3] see NOTE 8 (i), from which the statement made above will be clear.

As to the meaning of conditional legislation, it may be broadly described as legislation, the operation of which is conditional upon the decision of a specified authority, as distinguished from a legislation which is absolute and comes into operation of its own force and independently of the will of any other authority. In *Empress* v. *Burah*[4] the Privy Council observed as follows :

> "Where plenary powers of legislation exist as to particular subjects they may be well exercised either absolutely or conditionally. Legislation conditional on the use of particular powers or on the exercise of a limited discretion entrusted by the Legislature to persons in whom it places confidence is no uncommon thing; and in many circumstances it may be highly convenient."

In *the Delhi Laws Act case*,[5] Mukherjea, J., observed as follows :

> "In a conditional legislation, the law is full and complete when it leaves the legislative chamber, but the operation of the law is made dependent upon the fulfilment of a condition, and what is delegated to an outside body is the authority to determine, by the exercise of its own judgment, whether or not the condition has been fulfilled. 'The aim of all legislation', said O'Connor, J., in *Baxter* v. *Ah Way*[6] 'is to project their minds as far as possible into the future and to provide in terms as general as possible for all contingencies likely to arise in the application of the law. But it is not possible to provide specifically for all cases and therefore legislation from the very earliest times, and particularly in more modern times, has taken the form of conditional legislation, leaving

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[3] 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (S C), *In re Delhi Laws Act, 1912.*

[4] ('79) I L R 4 Cal 172 (182) : 5 Ind App 178 (195) (P C).

[5] 1951 S C 332 (393, 399) [AIR V 38 C 56] : 1951 S C R 747 (978, 979) (S C), *In re Delhi Laws Act, 1912.* (See also the observations of Kania C. J. in the same case at pp. 338 and 347 of A I R 1951 S C.)

[6] (1909) 8 C L R 626 (637).

it to some specified authority to determine the circumstances in which the law shall be applied or to what its operation shall be extended or the particular class of persons or goods or things to which it shall be applied.' In spite of the doctrine of separation of powers, this form of legislation is well recognised in the legislative practice of America, and is not considered as an encroachment upon the anti-delegation rule at all. As stated in a leading *Pennsylvania case (Locke's Appeal),*[7] 'the Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of Government. There are many things upon which wise and useful legislation must depend, which cannot be known to the law-making power and must, therefore, be a subject of inquiry and determination outside the halls of legislation.' "

The following observations from the judgment of the Privy Council in *Empress* v. *Burah*,[8] already referred to, with reference to the legislation in question in that case, bring out the characteristics of conditional legislation :

> "What has been done is this. The Governor-General in Council has determined, in the due and ordinary course of legislation, to remove a particular district from the jurisdiction of the ordinary Courts and offices, and to place it under new Courts and offices, to be appointed by, and responsible to, the Lieutenant-Governor of Bengal, leaving it to the Lieutenant-Governor to say at what time that change shall take place and also enabling him not to make what laws he pleases for that or any other district, but to apply by public notification to that district any law, or part of a law, which either already was, or from time to time might be, in force, by proper legislative authority, 'in the other territories subject to his government.' The Legislature determined that so far a certain change should take place; but that it was expedient to leave the time and the manner of carrying it into effect to the discretion of the Lieutenant-Governor; and also that the laws which were or might be in force in the other territories subject to the same Government were such as it might be fit and proper to apply to this district also; but that, as it was not certain that all those laws, and every part of them, could with equal convenience be so applied, it was expedient, on that point also, to entrust a discretion to the Lieutenant-Governor. . . . .
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> "The proper Legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to

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[7] (1873) 13 Am Rep 716 (722) : 72 Penn St 491.

[8] ('79) I L R 4 Cal 172 (181) : 5 Ind App 178 (P C).

legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute."

The underlying principle of the validity of conditional legislation was expressed by the Supreme Court of America in *Yakus* v. *United States*[9] as follows :

> "The Constitution does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be pre-requisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself to properly investigate."

For similar observations, see the cases noted below.[10]

From the above, it will be seen that in conditional legislation there is no delegation of legislative power in the sense of determination of legislative policy and its formulation into a binding rule of

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[9] (1944) 88 Law Ed 834 (848) : 321 U S 414 (424).

[10] 1945 P C 48 (51) [AIR V 32] : 1945 F C R 161 : 72 Ind App 57 : ILR (1945) Kar (P C) 97 : 46 Cri L Jour 589 (P C), *Emperor* v. *Benoari Lal.* (The impugned legislation was merely an example of the uncommon legislative arrangement by which the local application of the provision of a statute was determined by the judgment of a local administrative body as to its necessity.)

1955 NUC (Nag) 1341 [AIR V 42] (FB), *Ganpatrao Yadorao* v. *State of Madhya Pradesh.* (The power to determine the circumstances in which the law should be applied, to what area its operation should be extended and the date on which it would commence its operation, does not come under legislative power and could be delegated.)

1954 Bom 261 (266) [AIR V 41 C 76] : ILR (1954) Bom 647, *Cantonment Board, Poona* v. *Western India Theatres, Ltd.*

1952 Orissa 260 (264) (Pr 9) [AIR V 39] : 1952 Cri L Jour 1354 (DB), *Jagadish Patel* v. *Patel Tobacco Co.* (Once the Legislature declares the policy of the law and fixes the legal principles which are to be applied in given cases it may validly invest any administrative body with powers to ascertain facts and conditions to which the policy and principles apply.)

(1942) 87 Law Ed 1774 (1787) : 320 U S 81 (102), *Hirabayashi* v. *United States.* (The mandate of the Constitution that all legislative power granted shall be vested in Congress has never been thought, even in the administration of civil affairs, to preclude Congress from resorting to the aid of executive or administrative officers in determining by finding whether the facts are such as to call for the application of previously adopted legislative standards or definitions of Congressional policy.)

(1928) 72 Law Ed 624 (629) : 276 U S 394 (407), *Hampton J. R. & Co.* v. *United States.* (Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an executive or as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be affected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement because the power has already been exercised legislatively by the body vested with that power under the Constituconduct. This is done by the Legislature itself, and it is only the function of determining when and where the legislation should be brought into operation that is delegated to the extraneous authority. A very familiar form of conditional legislation is met with where the Legislature authorises an external authority like the Executive to determine the time of the commencement of an Act and the area of its application, after determining, if necessary, certain facts.[11] The

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tion, the condition of its legislation going into effect being made dependent by the Legislature on the expression of the voters of a certain district.)

(1915) 59 Law Ed 552 (560) : 236 U S 230, *Mutual Film Corp.* v. *Industrial Commission of Ohio.* (The Legislature must declare the policy of the law and fix the legal principles which are to control given cases; but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply.)

(1882) 7 App Cas 829 (835) : 51 L J P C 77, *Russell* v. *The Queen.*

(1873) 13 Am Rep 716 (722) : 72 Penn. St. 491, *Locke's Appeal.*

11. ('79) ILR 4 Cal 172 (183): 5 Ind App 178 (195, 196) (PC), *Empress* v. *Burah.* (Towards the end of the judgment reference is made to provisions in the Codes of Civil Procedure (1859) and Criminal Procedure (1861) as examples of such legislation.)

1950 Mad 248 (216, 247) (Pr 6, 9) : [AIR V 37 C 110] : 51 Cri L Jour 615 (DB), *In re Veerabhadrayya.*

[*See* 1952 Madh B 143 (144) (Pr 6) [AIR V 39] : 1952 Cri L Jour 1216, *Baboolal* v. *State.* (Section 1 (c) clearly states that the Madhya Bharat Foodgrains Control Order shall come into force on such date and in such areas as the Director of Food may by notification specify.)]

The following are some of the other instances of the Central Legislature authorising the executive to determine the time of commencement *of an Act* :

Administrator-General's Act, 1913, S. 1 (3).
Arms Act, 1878, S. 2.
Bar Councils Act, 1926, S. 1 (3).
Berar Laws Act, 1941, S. 1 (2).
Boilers Act, 1923, S. 1 (3).
Cantonments Act, 1924, S. 1 (3).
Central Excises and Salt Act, 1944, S. 1 (3).
Coal Mines Labour Welfare Fund Act, 1947, S. 1 (3).
Damodar Valley Corporation Act, 1948, S. 1 (3).
Dock Labourers Act, 1934, S. 1 (3).
Electricity Act, 1910, S. 1 (3).
Employees' State Insurance Act, 1948, S. 1 (3).
Excess Profits Tax Act, 1940, S. 1 (3).
Explosives Act, 1884, S. 2.
Extradition Act, 1903, S. 1 (3).
Government Trading Taxation Act, 1926, S. 1 (2).
Imperial Bank of India Act, 1920, S. 1 (2).
Insurance Act, 1938, S. 1 (3).
Legal Practitioners (Fees) Act, 1926, S. 1 (3).
Mines and Minerals (Regulation and Development) Act, 1948, S. 1 (3).
Motor Vehicles Act, 1939, S. 1 (3).
Pharmacy Act, 1948, S. 1 (3).

power to extend the operation of an Act to a certain area may be contained in the same Act or a different Act. The Transfer of Property Act, S. 1 is an instance of such a power being contained in the same Act. The enactment which was in question in *Emperor* v. *Benoari Lal*[12] namely, the Special Criminal Courts Ordinance, 1942, was also one in which the power, which was conferred on the Executive of bringing into operation the enactment in a local area, was contained in the same enactment. But *the Delhi Laws Act case*[13] furnishes instances of enactments empowering the Executive to extend *other* enactments to the designated local areas. (For details see NOTE 8.) *Empress* v. *Burah*[14] also dealt with an enactment which conferred on the Executive power to extend laws other than the empowering enactment. In other words, it was also a case in which the power to extend was contained in an enactment different from the enactments which were to be extended to the areas in question. Even in these cases the legislation is of the conditional type and is valid. Both in *Empress* v. *Burah*[15] and *the Delhi Laws Act case*,[16] the Executive was empowered to extend not only *existing* laws but also future laws and it was

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Provident Funds Act, 1925, S. 1 (3).
Tariff Act, 1934, S. 1 (3).
Tea Districts Emigrant Labour Act, 1932, S. 1 (3).
Trade Marks Act, 1940, S. 1 (3).
War Injuries (Compensation Insurance) Act, 1943, S. 1 (3).
Weekly Holidays Act, 1942, S. 1 (3).

The following are some of the other instances of the Central Legislature authorising the executive to determine the area of application *of an Act* :
Indian Bar Councils Act, 1926, S. 1 (2).
Criminal Law Amendment Act, 1908, S. 1 (2).
Elephants Preservation Act, 1879, S. 1.
Employees' State Insurance Act, 1948, S. 1 (5).
Forest Act, 1927, S. 1 (3).
Legal Practitioner's Act, 1879, S. 1.
Prevention of Cruelty to Animals Act, 1890, S. 1 (2).
Public Gambling Act, 1867, S. 2.
Reformatory Schools Act, 1897, S. 1 (3).
Suits Valuation Act, 1887, S. 2.
Tolls Act, 1864, S. 3.
T. P. Act, 1882, S. 1.
Trusts Act, 1882, S. 1.
Vaccination Act, 1880, Ss. 1 and 3.

[12] 1945 P C 48 (51) [AIR V 32] : 1945 F C R 161 : 72 Ind App 57 : ILR (1945) Kar (PC) 97 : 46 Cri L Jour 589 (PC).

[13] 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[14] ('79) ILR 4 Cal 172 : 5 Ind App 178 (PC).

[15] ('79) ILR 4 Cal 172 (182, 183) : 5 Ind App 178 (PC).

[16] 1951 S C 332 (405, 406, 440) [AIR V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

held that such a power was valid. In *the Delhi Laws Act case*[17] there was a further peculiarity, namely, that the Executive was empowered to extend not only the laws passed by the same Legislature, that is, the Legislature which passed the empowering enactment, but also laws passed by *other* Legislatures functioning within the area over which the Legislature which passed the empowering enactment has legislative jurisdiction. Still, it was held by the majority of the Judges that the legislation was a valid conditional legislation and came within the purview of *Empress* v. *Burah.*[18] It must be remembered, however, that the areas to which an enactment is empowered to be extended should be within the legislative jurisdiction of the Legislature which passes the enabling Act.

When extending an Act to any local area the Executive may be empowered to make necessary modifications of a minor kind which do not affect any matter of policy of the enactment.[19]

The determination of the question when the legislation should become effective may be left to the popular vote of the residents of a district to be affected by the legislation instead of to the Executive or the Government.[20] This will be also a form of conditional legislation.

Apart from the form in which the Legislature leaves it to the Executive or other external authority to determine the commencement of an Act or the local applicability of an Act, conditional legislation may take other forms also in which the Executive or other

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17. 1951 S C 332 (405, 406, 440) [AIR V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

18. ('79) ILR 4 Cal 172 : 5 Ind App 178 (PC).

19. 1954 S C 569 (574) [AIR V 41 C 131]: 1955 S C R 290 (SC), *Rajnarain Singh* v. *Chairman P. A. Committee.*

1951 S C 332 (406, 407) [A I R V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

1955 All 554 (556) [(S) AIR V 42 C 160] (DB), *Ziaullah Khan* v. *State of Uttar Pradesh.* (Power may be given to extend an Act to a specified locality with such modifications and alterations as the necessities of the situation may require, and to repeal those existing laws only which would impliedly stand repealed when the Act is so extended.)

20. (1928) 276 U S 394 (407) : 72 Law Ed 624, *Hampton J. R. & Co.* v. *United States.*

(1882) 7 App Cas 829 (835) : 51 L J P C 77, *Russell* v. *The Queen.* (The Canadian Temperance Act 1867, which prohibited the traffic in intoxicating liquors, contains within itself the whole legislation on the matters with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not amount to delegated legislation but is an instance of conditional legislation. The Act does not delegate any legislative powers whatever. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled.)

(1873) 13 Am Rep 716 (722) : 72 Penn St 491, *Locke's Appeal.* (An Act authorising the voters of a municipal district to decide at an election, 'for' or 'against' granting license for the sale of intoxicating liquor is not unconstitutional.)

external authority determines the matters to which an Act should be made applicable.

Illustrations.

(aa) *State of Bombay* v. *Narottam Das.*

In *State of Bombay* v. *Narottam Das*[21] a provision enabling the State Government to extend the jurisdiction of a civil Court up to a specified limit was held to be valid and was not open to impeachment as a delegation of legislative authority. The Act in question in that case was the Bombay City Civil Courts Act, 1948, which created an additional civil Court for Greater Bombay having jurisdiction to try all suits not exceeding Rs. 10,000 in value. Section 4 of the Act provided that the State Government might by a notification raise the jurisdiction to try suits up to Rs. 25,000 in value. Section 4 was impeached as being an unconstitutional delegation of legislative authority. The plea was rejected by the Supreme Court. Mukherjea, J., observed as follows in the course of his judgment[22]:

> "The Legislature in empowering the Provincial Government to invest the City Court, by notification, with jurisdiction of such value not exceeding Rs. 25,000 as may be specified in the notification, has not delegated its legislative authority to the Provincial Government. The provision relates only to the enforcement of the policy which the Legislature itself has laid down. The law was full and complete when it left the legislative chamber permitting the Provincial Government to increase the pecuniary jurisdiction of the City Court up to a certain amount which was specified in the Statute itself. What the Provincial Government is to do is not to make any law; it has to execute the will of the Legislature by determining the time at which and the extent to which, within the limits fixed by the Legislature, the jurisdiction of the Court should be extended. This is a species of conditional legislation which comes directly within the principle enunciated by the Judicial Committee in *Empress* v. *Burah*,[23] where the taking effect of a particular provision of law is made to depend upon determination of certain facts and conditions by an outside authority."

(b) *Emperor* v. *Benoarilal.*

In *Emperor* v. *Benoarilal*[24] the dispute was about the validity of an Ordinance passed by the Governor-General under Sch. IX, S. 72 of the Government of India Act, 1935. The Ordinance, which was known as the Special Criminal Courts Ordinance (No. 2 of 1942) provided for the setting up of Special Criminal Courts for the trial of certain offences laying down the jurisdiction, procedure, etc., of such courts. By S. 1 (3) of the Ordinance it was provided that the Ordinance was to come into force in any Province if the Provincial Government, being satisfied of the existence of the emergency in the Province, declared it to be in force in that Province. It was held by the Privy Council that the Ordinance could not be challenged as a piece of delegated legislation. It was merely an example of the not uncommon legislative arrangement by which the local application of the provisions of a statute was determined by the judgment of a local administrative body. It will be seen that although this case is also an illustration of the form of legislation in which the local applicability of a law is left to the Executive, the case has this peculiarity that this power is not given to a single authority but to the different local authorities in the respective areas. In this respect, the form of legislation resembles that in which the local application of an Act is left to be determined by the vote of the local people in an area.

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[21] 1951 S C 69 (79, 80, 86) [AIR V 38 C 10] : 1951 S C R 51 (SC). (Reversing AIR 1951 Bom 180.)

[22] 1951 S C 69 (86) (Pr 37, 55) [AIR V 38 C 10] : 1951 S C R 51 (SC), *State of Bombay* v. *Narottamdas.* (See similar observations of Mahajan J. on page 79 para 37 of A I R 1951 S C.)

[23] ('79) ILR 4 Cal 172 : 5 Ind App 178 (PC).

[24] 1945 P C 48 (51) [AIR V 32] : 1945 F C R 161 : 72 Ind App 57 : ILR (1945) Kar (PC) 97 : 46 Cri L Jour 589 (PC).

[*See also* 1943 Bom 169 (172) [AIR V 30] : 44 Cri L Jour 616 (FB), *Shrikant Pandurang* v. *Emperor.*

(c) Power of State Government to refer cases to special Court for trial.

Where an Act providing for the constitution of special courts leaves it to the discretion of the State Government or other executive authority to determine what cases are to be referred for trial by the special Court, there cannot be said to be any illegal delegation of legislative power to the Executive. Such a case is covered by the principle of *Emperor* v. *Benoarilal*[25] and *Empress* v. *Burah*[26] mentioned above.[27]

(d) Power to add new items to those specifically mentioned.

Where a legislative provision mentions certain items expressly with reference to which the legislation is to take effect and gives power to the Executive or other external authority to *add* to the items expressly mentioned, it has been held that there is no delegation

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1943 Cal 285 (300) [AIR V 30] : 44 Cri L Jour 673 (SB), *Bansilal Sarma* v. *Emperor*. (The P. C. appeal arose from this case in which the Calcutta High Court had expressed the same view though its decision was reversed in appeal by the Federal Court the decision of which was reversed in turn by the P. C.).]

[25] 1945 P C 48 (51) [AIR V 32] : 1945 F C R 161 : 72 Ind App 57 : ILR (1945) Kar (PC) 97 : 46 Cri L Jour 589 (PC).

[26] ('79) ILR 4 Cal 172 (182) : 5 Ind App 178 (PC).

[27] 1952 S C 123 (Pr 9, 39, 49) [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC), *Kathi Raning* v. *State of Saurashtra*. (On appeal from AIR 1951 Sau 69 (73)).

1951 Mys 72 (75, 76) (Pr 8) [AIR V 38 C 33] : ILR (1951) Mys 284 : 52 Cri L Jour 992 (FB), *Abdul Khader* v. *State of Mysore*. (The Act does not give any right to the executive to make the law but only provides that it will come into operation at such time and in such areas as may be determined by the Govt. or a servant of the Govt.)

1953 Hyd 145 (149) (Pr 14) [AIR V 40 C 64] : ILR (1951) Hyd 895 : 1953 Cri L Jour 785, *Abdul Munim Khan* v. *State of Hyderabad*.

of legislative power but only a form of conditional legislation. Thus, it has been held by the Supreme Court that S. 52 of the Bombay Prohibition Act (25 of 1949) under which power is given to the Government to grant licences in cases other than those specifically provided does no more than enable the duly authorised officer to meet contingencies and deal with various situations as they arise and hence is not *ultra vires* on the ground of being an unconstitutional delegation of legislative power.[28]

In *Edward Mills Co. Ltd.* v. *State of Ajmer*[29] the Supreme Court upheld the validity of S. 27 of the Minimum Wages Act, 1948, which was also attacked on the ground of its amounting to unconstitutional delegation of legislative power. Under that section power was given to the "appropriate Government" to add to the schedule to the Act which enumerated the trades and industries to which the provisions of the Act were to apply. It was contended that the section did not lay down any principles or standard for the guidance of the executive authority which was given the power to add to the schedule, and so, was *ultra vires* as seeking to delegate essential legislative power. The Supreme Court overruled the objection and held that this was not the correct view to take of the Act. Mukherjea J., in delivering the judgment of the Supreme Court, observed as follows :

> "The legislative policy is apparent on the face of the present enactment. What it aims at is the statutory fixation of minimum wages with a view to obviate the chance of exploitation of labour.
>
> "The Legislature undoubtedly intended to apply this Act not to all industries but to those industries only where by reason of unorganized labour or want of proper arrangements for effective regulation of wages or for other causes the wages of labourers in a particular industry were very low. It is with an eye to these facts that the list of trades has been drawn up in the schedule attached to the Act but the list is not an exhaustive one and it is the policy of the Legislature not to lay down at once and for all time, to

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[28] 1951 S C 318 (327) (Pr 23) [AIR V 38 C 55] : 1951 S C R 682 (714) : 52 Cri L Jour 1361 (SC), *State of Bombay* v. *F. N. Balsara*. (On similar considerations S. 53 (Power to vary or substitute conditions of licence laid down in the Act) and S. 139 (c) (Power to exempt any person or institution from observance of all or any of the provisions) were held not *ultra vires* : Reversing on this point AIR 1951 Bom 210.))

[*See also* 1951 Nag 58 (89) (Pr 210) [AIR V 38 C 20] : ILR (1951) Nag 646 : 52 Cri L Jour 1140 (FB), *Sheo Shankar* v. *M. P. State Govt.* (The power delegated by S. 29 (2) and S. 32 (a), C. P. & Berar Prohibition Act 1938, does not amount to delegation of legislative power. It is merely a power to determine the circumstances in which the law shall be applied or to what areas its operation shall be extended or the particular class of persons to whom it shall be applied: 5 Ind App 178; AIR 1945 P C 48 and AIR 1951 S C 69, Ref. to.)]

[29] 1955 S C 25 (32, 33) (Pr 17) [(S) AIR V 42 C 7] : 1955 S C R 735 (SC).

> which industries the Act should be applied. Conditions of labour vary under different circumstances and from State to State and the expediency of including a particular trade or industry within the schedule depends upon a variety of facts which are by no means uniform and which can best be ascertained by the person who is placed in charge of the administration of a particular State.
>
> "It is to carry out effectively the purpose of this enactment that power has been given to the 'appropriate Government' to decide, with reference to local conditions, whether it is desirable that minimum wages should be fixed in regard to a particular trade or industry which is not already included in the list. We do not think that in enacting S. 27 the Legislature has in any way stripped itself of its essential powers or assigned to the administrative authority anything but an accessory or subordinate power which was deemed necessary to carry out the purpose and the policy of the Act."

Another case which falls under the same principle is *Powell* v. *Apollo Candle Co.*[30] The question which arose in that case was whether S. 133 of the Customs Regulation Act, 1879, of New South Wales was or was not *ultra vires* of the Colonial Legislature. The section provided that

> "Whenever any article or merchandise then unknown to the Collector is imported, which in the opinion of the Collector or the Commissioners, is apparently a substitute for any dutiable article, or is apparently designed to evade duty, but possesses properties in the whole or in part which can be used or were intended to be applied for a similar purpose as such dutiable article, it shall be lawful for the Governor to direct that a duty be levied on such article at a rate to be fixed in proportion to the degree in which such unknown article approximates in its qualities or uses to such dutiable article."

It was held by the Privy Council that the section did not constitute any unconstitutional delegation of legislative power to the Governor.

For further examples of the same kind and falling under the same principle, see the undermentioned cases.[31]

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[30] (1885) 10 App Cas 282 (291) : 54 L J P C 7.

[31] 1956 Mys 7 (8) (Pr 4) [(S) AIR V 43 C 2] (DB), *Firebricks and Potteries Ltd.* v. *Worker's Union.* (Section 2 (a), Industrial Disputes Act, 1947, no doubt, allows the Central Government option to treat the settlement of disputes in some industries as its exclusive concern. Such delegation is not peculiar to this Act and is found in other Acts too, as the Legislature cannot ascertain or anticipate the conditions and circumstances pertaining to the numerous industries in the country with the facility and advantage the Government has. If

(e) Power to exempt from provisions of an Act.

The power given to the Executive under S. 139 (c) of the Bombay Prohibition Act, 1949, to exempt persons and institutions from the observance of all or any of the provisions of the Act does not offend the rule against delegation of legislative authority.[32]

(f) Power to vary or substitute conditions of licence.

It has been held by the Supreme Court in *State of Bombay* v. *Balsara*[33] that S. 53 of the Bombay Prohibition Act, 1949, under which the Executive is given the power to vary or substitute the conditions of licence laid down in the Act does not offend the rule against delegation of legislative power and only enables the Executive to meet contingencies and deal with various situations as they arise.

(g) Power to extend duration of Act.

In *Jatindra Nath Gupta* v. *Province of Bihar*[34] it was held by the majority of the Federal Court that the power to extend the

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as a result of the specification, the reference in some cases is to be made by the Central Government and in others by the State Government, it cannot be said that there is differentiation in a matter of substance or that the principle of equality under Art. 14 of the Constitution or rule relating to delegation is contravened. Section 2 (a) is therefore not unconstitutional : AIR 1955 S C 25 : 1955 S C R 735, Rel. on.)

1953 Ajmer 65 (69, 70) (Prs 26, 27, 28) [AIR V 40 C 70], *Edward Mills Co.* v. *State of Ajmer.* (Section 27, Minimum Wages Act, is not *ultra vires* on the ground that the power conferred by it amounts to unrestricted delegation of power to the appropriate Government. S. 27 states that the appropriate Government may by notification add any employment to the schedule and therefore the schedule shall be deemed to be amended accordingly. This power was not really one of making any amendments. It was merely authorised to extend the application of the Act to other employments or other industries not mentioned in the Schedule, at its discretion subject to the essential condition that the particular industry to which the Act was intended to apply employs at least 1000 employees within the State as contemplated by the proviso to S. 3 (1) (b) of the Act. No power to legislate or amend the law as passed by the Parliament was in fact delegated.)

1952 Orissa 260 (264) [AIR V 39] : 1952 Cri L Jour 1354 (DB), *Jagdish Patel* v. *Patel Tobacco Co.* (Section 2 (a) of Orissa Essential Articles Control and Requisitioning (Temporary Powers) Act, 1 of 1947, is not invalid—It merely says that any article specified in the Schedule to the Act and any other article which may be declared by the Provincial Government to be an essential article shall be an essential article.)

(1909) 8 C L R (Aus) 626 (637), *Baxter* v. *Ah Way.* (Customs Act of 1901 prohibited the importation of certain goods which were specifically mentioned and then gave power to the Governor-General in Council to include, by proclamation, other goods also within the prohibited list—*Held*, that this was not a case of delegation of legislative power but of conditional legislation of the type which was held valid by the Privy Council in *Reg* v. *Burah* (1878) 3 A C 889 : ILR 4 Cal 172.)

[32] 1951 S C 318 (327) [AIR V 38 C 55] : 1951 S C R 682 (714) : 52 Cri L Jour 1361 (SC), *State of Bombay* v. *F. N. Balsara.*

[33] 1951 S C 318 (327) [AIR V 38 C 55] : 1951 S C R 682 (714) : 52 Cri L Jour 1361 (SC).

[34] 1949 F C 175 (178) (Pr 7) [AIR V 36 C 30] : 1949 F C R 595 : ILR 28 Pat 703 : 50 Cri L Jour 897 (FC).

operation of a temporary Act beyond the period mentioned in the Act is a legislative power which cannot be delegated to any other body and a provision conferring power on the Provincial Government to extend up to a specified limit the operation of a temporary Act, amounts to an unconstitutional delegation of legislative power and is *ultra vires*. It was held by the majority that such a provision could not be construed as a "conditional legislation." The question arises whether this view is affected by the decision of the Supreme Court in *the Delhi Laws Act case.*[35] As seen in NOTE 8, *the Delhi Laws Act case*[36] was a reference to the Supreme Court under ART. 143 and the reference was made by the President as the decision of the Federal Court in *Jatindra Nath's case*[37] had raised the question of delegated legislation and had created a doubt as to the validity of the three Acts which constituted the subject of the reference. But although the reference was due to the doubt created by the *Jatindra Nath's case*[38] the particular aspect of delegated legislation which was in question in that case, namely, the validity of a power to extend the duration of a temporary Act, was not *specifically* considered by the Supreme Court in *the Delhi Laws Act case.*[39] But in the light of the views expressed by the majority of Judges in the *Delhi Laws Act case*[40] it would seem that in conferring on the Government the power of extending up to a *specified* period the duration of a temporary Act, the Legislature does not delegate to the Government any *essential* legislative power so as to render a provision conferring such power unconstitutional and *ultra vires* and hence such power is valid.[41] The contrary view in *Jatindranath's*

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[35] 1951 S C 332 [AIR V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[36] 1951 S C 332 (361, 362) (Prs 92, 93) [AIR V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[37] 1949 F C 175 [A I R V 36 C 30] : 1949 F C R 595 : I L R 28 Pat 703 : 50 Cri L Jour 897 (FC), *Jatindra Nath* v. *Province of Bihar.*

[38] 1949 F C 175 (178) (Prs 7, 8) [A I R V 36 C 30] : 1949 F C R 595 : I L R 28 Pat 703 : 50 Cri L Jour 897 (FC), *Jatindra Nath* v. *Province of Bihar.*

[39] 1951 S C 332 [A I R V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[40] 1951 S C 332 [A I R V 38 C 56] : 1956 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[41] 1955 All 48 (49) (Pr 6) [AIR V 42 C 15] (FB), *Murarilal* v. *State.* (U. P. (Temporary) Accommodation Requisition Act (1947), S. 1 (5), not *ultra vires* : AIR 1951 All 181 held no longer good law in view of AIR 1951 S C 332.)

1955 N U C (All) 147 [AIR V 42] (FB), *Mst. Bhagwati Devi* v. *Sardar Balwant Singh.* (U. P. (Temporary) Accommodation Requisition Act (25 of 1947), S. 1 (5)—It is not delegated legislation—Government could validly extend Act for one year beyond 30th September 1948.)

1949 Pat 1 (7) (Prs 10, 11) [AIR V 36 C 1] : ILR 27 Pat 773 : 50 Cri L Jour 44 (FB), *Nek Mohammad* v. *Province of Bihar.*

case[42] and other decisions[43] must be held to be not good law after *the Delhi Laws Act case.*[44] But where the Legislature has not laid down the maximum period up to which the duration of the Act can be extended by the Executive, the conferment of the power of extension on the Executive would be a delegation of essential legislative power and would be unconstitutional.[45]

1955 Madh B 177 (178, 179) (Prs 5, 6) [(S) AIR V 42 C 54] (DB), *Firm Kashiram Biharilal* v. *Badrilal.* (The proviso to S. 1 (4) of the Madhya Bharat Sthan Niyantran Vidhan which authorises the Government to extend the duration of the Act for a further period of two years from 30-6-1951 is not invalid on the ground of delegation of legislative powers : AIR 1951 S C 484, Foll.)

1955 Madh B 76 (78) (Prs 28, 29) [(S) AIR V 42 C 22], *Motilal* v. *Ganeshilal.* (Power conferred upon the executive Government to extend the operation of an Act is not a delegated power of legislation but is merely subsidiary to the enforcement of the Act. Therefore, the order of the Madhya Bharat Government extending the duration of the M. B. Sthan Niyantran Vidhan by two years under its Notification No. 66 (8) JJ 51, dated 26.3-1951 in the case of Mhow Cantonment is not bad because it amounts to a delegated legislation. It was a conditional legislation when made : AIR 1952 Bom 16 and AIR 1952 Assam 69 (FB), Rel. on.)

1954 Raj 252 (260) (Pr 32) [A I R V 41 C 79] : I L R (1954) 4 Raj 958 (DB), *Milapchand* v. *Dwarka Das.* (Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950), S. 31, Proviso—The impugned Act was validly extended by the Rajpramukh in November 1952, under the proviso to S. 31. The Legislature has applied its mind, and has fixed the total duration of the Act, namely, a period of five years.)

1952 Bom 16 (21) [AIR V 39 C 2] (DB), *State of Bombay* v. *Heman Santlal.* [*See also* 1951 S C 484 (486) (Pr 8) [AIR V 38 C 66] : 1952 Cri L Jour 69 : 1952 S C R 127 (SC), *Joylal Agarwala* v. *The State.* (Essential Supplies (Temporary Powers) Act, 1946—Extension from time to time held valid—Held also that "*Jatindra Nath Gupta* v. *Province of Bihar*, 1949 F C R 595: AIR 1949 F C 175, has no application here in the case now before us; the Legislature has itself applied its mind and has fixed the duration of the Act, but has left the machinery to reach the maximum period by instalments to be worked out in particular manner. Hence there is no question of delegation at all, much less any question of delegation of legislative power."')]

[42] 1949 F C 175 (178) (Pr 7) [AIR V 36 C 30] : 50 Cri L Jour 897 : 1949 F C R 595 : ILR 28 Pat 703 (FC), *Jatindra Nath* v. *Province of Bihar.*

[43] 1951 All 181 (194) [AIR V 38 C 20] : ILR (1952) 1 All 376 : 52 Cri L Jour 333 (FB), *Ram Kishan* v. *State.*

1951 Orissa 105 (109, 119, 121) (Prs 4, 31, 41) [AIR V 38 C 32] (FB), *Krishna Chandra* v. *Sushila.*

1950 Mad 243 (251, 254) (Prs 12, 17) [AIR V 37 C 110] : 51 Cri L Jour 615 (DB), *In re Veerabhadrayya.*

[44] 1951 S C 332 [A I R V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[45] 1954 Raj 252 (259) (Pr 30) [A I R V 41 C 79] : I L R (1954) 4 Raj 958 (DB), *Milapchand* v. *Dwarka Das.* (But where along with this power of extension within the maximum fixed by the Legislature, the power of modification is also given, the two become one power, and as the power of modification is essentially a legislative power, the extension would be invalidated even though there may be no actual modification : AIR 1949 F C 175, Foll.)

(h) The power to terminate the operation of an Act.

In *Luxmibai* v. *State of Madhya Pradesh*[46] it was held by a Full Bench of Nagpur High Court that the delegation of power by the Legislature to the Provincial Government to terminate by a Notification the operation of a temporary statute is not invalid. But it was opined incidentally by the Nagpur High Court in *Hiralal* v. *the State*[47] that the above decision must now be deemed as overruled by the majority view in *the Delhi Laws Act case.*[48]

It is submitted with respect that the opinion expressed in the later Nagpur case is not correct as there does not appear to be any difference in substance (as regards the nature of the power) between the power to determine the circumstances in which an Act may be brought into force in a particular area or at a particular time and the power to determine whether in the circumstances it is necessary to continue the operation of a temporary Act. Broadly speaking, all these types of legislation would seem to fall within the description of conditional legislation which has been held by *the Delhi Laws Act case*[49] to be valid beyond question.

In this connection, attention may be drawn to the trend of decisions (see NOTE 10 (g)) which show that the power to extend up to a specified limit the duration of a temporary Act can be validly conferred on the Executive.

(i) Other illustrative cases.

See the undermentioned cases.[50]

(i) Other illustrative cases.

1954 Raj 224 (225, 228) (Prs 6, 20) [AIR V 41 C 69] : ILR (1954) 4 Raj 861 (DB), *Sadaria* v. *Rajasthan Board of Revenue.* (Rajasthan (Protection of Tenants) Ordinance (9 of 1949), S. 1 (3) is invalid.)

[46] 1951 Nag 94 (109) (Pr 122) [AIR V 38 C 22] : ILR (1951) Nag 563 (FB).

[47] 1953 Nag 58 (61) [AIR V 40 C 25] : ILR (1952) Nag 770 : 1953 Cri L Jour 481 (DB).

[48] 1951 S C 332 [A I R V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[49] 1951 S C 332 [A I R V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[50] 1953 Cal 548 (551) (Pr 10) [AIR V 40 C 205], *Atulya Kumar* v. *Director of Procurement and Supply.* (Essential Supplies (Temporary Powers) Act (24 of 1946)—Does not permit delegation of legislative powers.)

(1944) 88 Law Ed. 834 (848) : 321 U S 414 (424), *Yakus* v. *United States.* (Emergency Control Act for fixing maximum prices of commodities by Administrator during war time emergency is valid as conditional legislation.)

(1942) 87 Law Ed 1774 (1788) : 320 U S 81 (104), *Hirabayashi* v. *United States.* (No delegation of legislative power is involved in conferring discretionary power upon commander of a military area in time of war to make a curfew order as a safeguard against espionage and sabotage.)

(1915) 59 Law Ed 552 (560) : 236 U S 230, *Mutual Film Corpn.* v. *Industrial Com.* (Legislative power is not unlawfully delegated by 103 Ohio Laws, 399 for the creation of a board of censors which is to examine and censor as a condition precedent to exhibition, motion picture films which are to be publicly exhibited and displayed in the State, and is to pass and approve only such films as are in its judgment, of a moral, educational or amusing and harmless character.)

11. Subordinate or ancillary legislation. — As seen in Notes 8 and 9, the two types of legislation known as conditional legislation and subordinate legislation are recognised as falling within the exceptions to the general rule that legislative power cannot be delegated by the Legislature. As to what constitutes conditional legislation and examples of such legislation, see NOTE 10.

As regards subordinate or ancillary legislation, it refers to cases in which the Legislature lays down the policy in more or less general terms and confers on an extraneous authority the power to make rules and regulations to carry out the legislative policy. It is open to the Legislature to formulate the policy as broadly and with as little or as much details as it thinks proper and it may delegate the rest of its work to a subordinate authority who will work out the details within the framework of that policy.[1]

Article 245 — Note 11

[1] 1954 S C 465 (468) [A I R V 41 C 112] . 1954 Cri L Jour 1322 : 1955 S C R 380 (SC), *Hari Shankar Bagla* v. *M. P. State.*

1951 S C 332 (400) [A I R V 38 C 56] : 1951 S C R 747 (982) (S C), *In re Delhi Laws Act, 1912.*

1955 All 653 (658) (Para 20) [(S) A I R V 42 C 189], *Firm Raghubar Dayal* v. *U. P. State.*

1955 N U C (Hyd) 1548 [AIR V 42] (DB), *Warangal Industries Ltd.* v. *Market Committee, Warangal.* (Power to make rules, bye-laws, etc. to carry out the law can be delegated.)

1954 Bom 261 (266) (Prs. 17, 18) [AIR V 41 C 76] : I L R (1954) Bom 647 (DB), *Cantonment Board, Poona* v. *Western India Theatres, Ltd.*

1953 Nag 58 (64, 68) [AIR V 40 C 25] : I L R (1952) Nag 770 : 1953 Cri L Jour 481 (DB), *Hiralal* v. *State.* (If the legislature lays down an intelligible principle to guide the outside agency that would be sufficient.)

1952 Mad 127 (133, 134) (Prs 18, 24) [A I R V 39 C 62] (DB), *Subba Rao* v. *I.T. Commr., Madras.*

1952 Orissa 260 (264) (Pr 10) [AIR V 39] : 1952 Cri L Jour 1354 (DB), *Jagadish Patel* v. *Patel Tobacco Co.*

(1948) 1 All E R 85 (87, 91) : (1948) 1 K B 349, *Blackpool Corporation* v. *Locker.* (The word 'legislation' has grammatically two meanings — the operation or function of legislating and the laws which result therefrom. So too 'delegated legislation' may mean either exercise by a subordinate authority, such as a Minister, of the legislative power delegated to him by Parliament, or the subsidiary laws themselves, passed by Ministers in the shape of departmental regulations and other statutory rules and orders.)

1946 Cal 197 (203) [A I R V 33 C 44] : I L R (1947) 2 Cal 95 (DB), *Khetsidas* v. *Pratapmull.*

1944 Lah 33 (46, 47) [A I R V 31] : 45 Cri L Jour 580 (FB), *Harkishan Das* v. *Emperor.* (If in the statute the Legislature has laid down a principle or a policy but left it to the executive to carry out that principle or policy subject to well-defined restrictions the enactment would be constitutional but if the Legislature has left it to the executive to lay down the principle or policy and thus given to it absolute and unrestricted discretion to legislate in the form of the power to make rules, the enactment would be unconstitutional.)

In *the Delhi Laws Act case*[2] Mukherjea, J., observed as follows :

> "Delegation of legislative authority could be permissible but only as ancillary to, or in aid of, the exercise of law-making powers by the proper Legislature, and not as a means to be used by the latter to relieve itself of its own responsibility or essential duties by devolving the same on some other agent or machinery. A constitutional power may be held to imply a power of delegation of authority which is necessary to effect its purpose; and to this extent delegation of a power may be taken to be implicit in the exercise of that power. This is on the principle 'that everything necessary to the exercise of a power is implied in the grant of the power.' Everything necessary to the effective exercise of legislation must,

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(1944) 88 Law Ed 834 (848) : 321 U S 414 (425), *Yakus* v. *United States.* (It is no objection to a statute that the determination of facts, and of the inferences to be drawn from them, in the light of the statutory standards and declaration of policy, call for the exercise of judgment and for the formulation of subsidiary administrative policy within the prescribed statutory frame work.)

(1940) 84 Law Ed 1263 (1274) : 310 U S 381 (399), *Sunshine Anthracite Coal Co.* v. *Adkins.* (That the application by an administrative agency of the definition found in a statute may in some instances be difficult does not show that legislative power has been unconstitutionally delegated.)

(1928) 276 U S 394 (406, 407) : 72 Law Ed 624 (629), *Hampton, J. R. & Co* v. *United States.* (Per *Taft C. J.*—"The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."—quoting with approval Ranney J., in *Cincinnati, W. & Z. R. Co.* v. *Clinton County Commissioners,* (1 Ohio St. 77, 88).

(1915) 59 Law Ed 552 (560) : 236 U S 230 (245), *Mutual Film Corporation* v. *Industrial Commission.* ("Undoubtedly the Legislature must declare the policy of the law and fix the legal principles which are to control in given cases ; but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws; and in an effort to detail and particularise, they would miss sufficiency both in provision and execution.")

(1883) 9 App Cas 117 (132) : 53 L J P C 1, *Hodge* v. *The Queen.* ("It was argued at the bar that a Legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them are matters for each Legislature and not for Courts of law, to decide.—Legislature can confide to a municipal institution or other body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment and with the object of carrying out the enactment into operation and effect. . . . . . . Such authority is ancillary to legislation and without it an attempt to provide for varying details and machinery to carry them out might become oppressive or absolutely fail.")

[2] 1951 S C 332 (397) : 1951 S C R 747 (973) (S C), *In re Delhi Laws Act, 1912.*

> therefore, be taken to be conferred by the Constitution within that power': Per O'Connor J. in *Baxter* v. *Ah Way.*[3] But it is not open to the Legislature to strip itself of its essential legislative function and vest the same on an extraneous authority. The primary or essential duty of law-making has got to be discharged by the Legislature itself; delegation may be resorted to only as a secondary or ancillary measure."

In the same case, Kania, C. J., observed (at p. 347, Para. 42 of A. I. R. 1951 S. C.):

> "The Legislature may in laying down the rule of conduct, express itself generally if the conditions and circumstances so require. Extent of the specific and detailed lines of the rule of conduct to be laid down may vary according to the circumstances or exigencies of each case. The result will be that if owing to unusual circumstances or exigencies, the Legislature does not choose to lay down detailed rules or regulations that work may be left to another body which is then deemed to have subordinate legislative powers."

As pointed out in Note 8, the "subordinateness" in subordinate or ancillary legislation refers to the nature of *legislation* itself which is delegated, and not only to the subordinate character of the *agency* which is entrusted with the power to legislate.[4] Hence, so far as legislative policy is concerned it must be determined by the Legislature itself and it is only the task of working out the policy by appropriate rules and regulations that can be delegated to a subordinate agency.[5] In *V. M. Syed Mahomed & Co.* v. *State of Madras,*[6] the Madras High Court observed as follows :

> "The law is well settled and may be summed up in two propositions: (1) the enunciation of policy is a matter exclusively within the competence of the Legislature and incapable of delegation to other bodies; (2) it is not unconstitutional to entrust to special bodies the carrying out of the policies declared by the Act and for that purpose to clothe them with authority to frame regulations within the frame-work of the Act."

Although, the general principles are clear, their practical application to actual cases gives rise to complicated problems.[7] (See Note 9.)

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[3] (1909) 8 C L R 626 (637).

[4] 1951 S C 332 (400) [A I R V 38 C 56] : 1951 S C R 747 (982) (S C), *In re Delhi Laws Act, 1912.*

[5] 1951 S C 332 (400) [A I R V 38 C 56] : 1951 S C R 747 (984) (S C), *In re Delhi Laws Act, 1912.*

[6] 1953 Mad 105 (110) [A I R V 40 C 35] : 1953 Cri L Jour 277 (DB).

[7] 1953 Mad 105 (110) [A I R V 40 C 35] : 1953 Cri L Jour 277 (DB), *V. M. Syed Mohamed & Co.* v. *State of Madras.*

(1915) 236 U S 230 (245) : 59 Law Ed 552 (560), *Mutual Film Corporation* v. *Industrial Commission.* (While administration and legislation are quite distinct

Every "sovereign" Legislature has the power of delegating subordinate legislative power and the existence of limitations on the power of Legislature does not affect its competency in this matter.[8]

The undermentioned cases[9] are illustrative of the validity of subordinate legislation in the sense explained above. Among

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powers, the line which separates exactly their exercise is not easy to define in words. It is best recognized in illustrations.)

(1825) 6 Law Ed 253 (263) : 10 Wheat 1, *Wayman* v. *Southard*. (Per *Marshall C. J.*—The line has not been exactly drawn which separates those important subjects which must be entirely regulated by the Legislature itself from those of less interest in which a general provision may be made and power given to those who are to act under such general provisions to fill up the details.)

[8] 1954 Bom 261 (268) (Pr 24) [A I R V 41 C 76] : I L R (1954) Bom 647 (DB), *Cantonment Board, Poona* v. *Western India Theatres, Ltd.* (A Legislature does not become a non-sovereign Legislature merely because there are limits upon its powers. It may not be sovereign in one particular sense but it does not make any difference to the sovereign character of a Legislature that it must function within certain specified limits and it does not make any difference to the sovereign character of the Legislature if an Act which is passed by it requires the sanction of some outside body, such as the Governor-General. (Bombay District Municipalities Act, S. 59 (1) is not void on ground of delegation.)

Point 9.

Land legislation.

1952 S C 252 [A I R V 39] : 1952 S C R 889 (1020, 1056) : I L R 31 Pat 565 (S C), *State of Bihar* v. *Kameshwar Singh*. (Bihar Land Reforms Act (30 of 1950), S. 32 (2) and S. 43 (2) (p)—Validity of—Under the former provision, compensation (for compulsory acquisition of property) was payable in cash or in bonds or partly in cash and partly in bonds — The bonds were to be either negotiable or non-negotiable and non-transferable and were payable in 40 equal instalments. Under S. 43 (2) (p), power was given to the State Govt. to frame rules providing for the proportion in which compensation shall be payable in cash and in bonds and the manner of payment of such compensation — It was held (Per *Patanjali Sastri J.*) that the sections were not ultra vires on the ground of unwarranted delegation of legislative power.—"By no standard of permissible delegation can the vesting of such limited discretion by a Legislature in an administrative body be held incompetent." (At p. 266, Pr. 21)

Per *Mahajan J.*—The delegation to this extent is permissible in view of the decision in *State of Bombay* v. *Narottamdas*, A I R 1951 S C 69 and *Queen* v. *Burah*, 5 Ind App 178 (P C). (At p. 278, Pr. 64)

Das J. also agrees. (Page 292, Pr. 110)

Per *Mahajan J.*—U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 6 (e), (g) and 68, provide for the prescription of the rate of interest by the Executive Government on mortgages and they also authorize the Local Government to determine the period of redemption of the bonds and the fixation of the ratio between payment of compensation in bonds and payment in cash. The delegation is within the permissible limits and does not amount to delegation of essential legislative power because main principles on these matters have been laid down in the Act and matters of detail have been left to the rule-making power. (Page 312, Para 211).)

1951 All 674 (697) (Pr 120) [A I R V 38 C 182] : I L R (1952) 2 All 46 (FB), *Suryapal Singh* v. *U. P. Government*. (U. P. Abolition of Zamindari and Land Reforms Act, 1 of 1951, not bad for delegation of legislative power.)

1952 All 88 (89) (Pr 8) [A I R V 39 C 29] (DB), *Mt. Govindi* v. *State of Uttar Pradesh.* (Do.)

1954 All 515 (515) (Pr 2) [A I R V 41 C 209], *Ram Dass* v. *Board of Revenue, U. P.* (U. P. Zamindari Abolition and Land Reforms Act (I of 1951) — Under clause (i) of S. 6 read with S. 26 the State Government has power to prescribe the nature of suits and proceedings pending at the date of vesting which are to be stayed. Thereafter under S. 26 the State Government is empowered to make rules to provide for the disposal of such suits and proceedings as have been stayed under clause (i) of S. 6. The delegation of this rule-making power to the State Government by the U. P. Legislature is valid and cannot be challenged : A I R 1952 S C 252, Rel. on.)

1954 Bom 397 (403) (Prs 14, 15) [A I R V 41 C 110] : I L R (1954) Bom 1278 (DB), *Chimanlal Dipchand* v. *State of Bombay.* (Bombay Tenancy and Agricultural Lands Act (LXVII of 1948), S. 6. — As S. 6 (2) of the Act is enacted after the Legislature had applied its mind to the vital policy underlying the statute and after it had come to the conclusion that that policy should be enforced and carried out by the Government reducing the maximum rent fixed by it by issuing notifications to suit special conditions and special localities, validity of the section cannot be challenged on the ground that it is delegated legislation.

Although the Legislature has not fixed the minimum, every reduction which the Government may bring about by a notification in the rents receivable by the landlord can only be in furtherance of the policy laid down by the Legislature and the policy is the improvement of the social and economic conditions of the peasants.

Further, the real apprehension on the part of the landlords is not that the Government will reduce rents in the economic and social interert of the peasants, but that it will reduce rents arbitrarily and capriciously. In deciding whether particular piece of legislation is bad on the ground that it is delegated legislation, it is not open to the Courts to consider that the delegated authority may act arbitrarily and capriciously and not in furtherance of the policy laid down by the Legislature.)

1953 Orissa 185 (218) (Pr 72) [A I R V 40 C 61] : I L R (1953) Cut 71 (DB), *Narayana Deo* v. *State of Orissa.* (The standard of fair and equitable rent though incapable of further and more precise definition is, for legal purposes, a definite standard. Section 168-A and S. 177 (2), inserted into the Madras Estates Land Act by the Madras Estates Land (Orissa) Amendment Act, 1947, are valid and are not open to objection as regards their validity either on the ground of their being invalid delegated legislation or on the ground of their purporting to vest in the State Government or the Collector arbitrary or discriminatory powers.)

[*See* 1955 Pat 445 (446) (Pr 4) [A I R V 42 C 116] : I L R 34 Pat 585 (DB), *Mineral Development Co., Ltd.* v. *State of Bihar.* (Bihar Land Reforms Act (XXX of 1950) (as amended in 1953), S. 4 (h)—It does not amount to delegation of legislative function.)]

Price, Supply, etc., Control Laws

1954 S C 465 (468) [A I R V 41 C 112] : 1954 Cri L Jour 1322 : 1955 S C R 380 (SC), *Hari Shankar Bagla* v. *M. P. State.* (S. 3 of Essential Supplies (Temporary Powers) Act, 1946, under which Central Government has been given power to pass orders under the Act is not bad as being an unconstitutional delegation of legislative power — Legislature has laid down the principle, viz., maintenance or increase in supply of essential commodities and securing equitable distribution and availability at fair prices — Principle is clear and offers sufficient guidance to the Central Government in exercising its powers under S. 3.)

1952 All 866 (870) (Pr 24) [AIR V 39] : 1952 Cri L Jour 1676 : ILR (1953) 2 All 226 (FB), *Bhushan Lal* v. *State.* (Essential Supplies (Temporary Powers) Act (1946), Ss. 3, 4 & 6 — Ss. 3 & 4 not *ultra vires* on the ground of delegation of essential legislative functions, while S. 6 is *ultra vires*, though its invalidity does not affect the validity of the rest of the Act. Definite policy in shape of objective to be achieved has been enunciated—It is not essential that Legislature should lay down standard as apart from policy.)

1951 All 816 (817) (Pr 10) [A I R V 38 C 199] : ILR (1952) 1 All 862 : 52 Cri L Jour 1474 (DB). *Sagar Mal* v. *The State.* (Ss. 3 and 4 of the Essential Supplies (Temporary Powers) Act (1946) not invalid on ground of unconstitutional delegation of legislative power—AIR 1951 All 674 (FB), Foll)

1951 Cal 120 (125) (Pr 40) [AIR V 38 C 30c] : ILR (1952) 2 Cal 296 : 52 Cri L Jour 934 (FB), *Ramananda* v. *The State.* (Essential Supplies (Temporary Powers) Act, 1946, S. 3 — Not invalid as delegating legislative power.)

1952 Pat 220 (230, 231) (Pr 29) [AIR V 39 C 55 (22)] : ILR 31 Pat 203: 1952 Cri L Jour 710 (SB), *Mohd. Anzar Husnain* v. *State of Bihar.* (Provisions of the Essential Supplies (Temporary Powers) Act are not void on account of an improper delegation of legislative powers.)

1952 Orissa 260 (264) (Pr 10) [AIR V 39] : 1952 Cri L Jour 1354 (DB), *Jagadish Patel* v. *Patel Tobacco Co.* (S. 3 of Orissa Essential Articles Control and Requisitioning (Temporary Powers) Act (1 of 1947) is a typical instance of subsidiary legislation which is also a well-known legislative practice in modern times.")

1952 Trav-Co 455 (458) (Pr 17) [AIR V 39] : ILR (1951) Trav-Co 655 (DB), *A. Cheerappan* v. *G. P. T.* (The power conferred upon the executive for regulating the acquisition of paddy and payment of compensation for it under Paddy (Acquisition and Movement) Control Order (1950) cannot amount to delegation of legislative powers which confers upon the executive arbitrary powers of action in view of the well-known rules that have to be observed by the executive in carrying out the responsible duties imposed upon them with regard to the acquisition of paddy and the payment of compensation for it.)

(1944) 88 Law Ed 834 (847, 848) : 321 U S 414 (423, 424), *Yakus* v. *United States.* (The standards set by the Emergency Price Control Act for the fixing of maximum prices of commodities by the Administrator during the war-time emergency in order to prevent inflation are sufficiently definite to avoid the constitutional objection of an unlawful delegation of legislative power to him, where the Act provides that the prices fixed shall effectuate the declared policy of the Act, that, they shall be 'fair and equitable,' that in fixing them the Administrator shall give due consideration, so far as practicable, to the prices prevailing during a designated base period with adjustments for such relevant factors as he may determine to be of general applicability, and that each regulation under the Act shall be accompanied by 'a statement of the considerations' involved in issuing it.)

(1940) 84 Law Ed 1263 (1273) : 310 U S 381, *Sunshine Anthracite Coal Co.* v. *Adkins.* (Bituminous Coal Act of 1937—Fixing of price by administrative agency according to criteria prescribed by the Act of minimum and maximum prices at which bituminous coal may be sold in inter-state commerce.)

(1904) 48 Law Ed 525 (535, 536) : 192 U S 470 (497), *Buttfield* v. *Stranahan.* (An unconstitutional delegation of legislative power to the secretary of the treasury is not made by the provision of Tea Inspection Act (1897) forbidding the importation of teas inferior to the Government standards of purity, quality and fitness for consumption which authorises him to establish such standards upon the recommendation of a board of tea experts, but such provision merely leaves to the secretary the executive duty to effectuate the legislative policy declared in the statute.)

Sales Tax laws

1955 All 653 (658) (Pr 20) [(S) AIR V 42 C 189], *Firm Raghubar Dayal* v. *U. P. State.* (Definition of 'importer' in U. P. Sales Tax Rules is not illegal or inoperative by reason either of its being *ultra vires* the rule-making power of the State Legislature or of its amounting to delegation of legislative power outside permissible limits.)

1953 Mad 105 (109) (Pr 11) [AIR V 40 C 35] : 1953 Cri L Jour 277 (DB), *V. M. Syed Mohamed & Co.* v. *State of Madras.* (Rules under Madras General Sales Tax Act not *ultra vires* as delegated legislation—What the legislature has done is merely to authorise the rule-making authorities to carry out the policies enumerated in the statute and to fill up the details—The Rules themselves are to come into operation only after they are approved by a Resolution of the House (Legislative Assembly)—Far from effecting self-effacement, the Legislature has retained complete control over the legislation and in fact it has exerted that control by introducing amendments of the Act from time to time. It must therefore be held that the Act and the Rules are not open to challenge on the ground of unconstitutional delegation.

Note : Some of the observations in this case which suggest that so long as the Legislature retains control over the legislation there is no objection to delegation do not seem to be sound — See Note 9.)

1954 Mad 1030 (1038) (Pr 29) [AIR V 41 C 360], *India Coffee and Tea Distributing Co., Ltd.* v. *State of Madras.* (Madras General Sales Tax Act (IX of 1939) not invalid on ground of delegation of taxing power by Legislature to executive.)

Defence of India Rules.

1947 Pat 16 (17) (Pr 1) [AIR V 34 C 6] : ILR 25 Pat 98: 48 Cri L Jour 207 (DB), *Mahabir Sahu* v. *Emperor.* (Rules under Defence of India Act, 1939 not *ultra vires.*)

1941 All 321 (323, 324, 326) [AIR V 28] : 42 Cri L Jour 839 (DB), *Meer Singh* v. *Emperor.* (Do.)

1951 All 44 (51) (Pr 12) [AIR V 38 C 7] : ILR (1952) 2 All 360 : 52 Cri L Jour 1191 (DB), *State* v. *Basdeo.* (Do.)

(1917) 1917 App Cas 260 (269) : 86 L J K B 1119, *R.* v. *Halliday.* (Reg. 14B of the Defence of the Realm (Consolidation) Regulation, 1914, which empowers the Secretary of State to order the internment of any person "of hostile origin or associations" where on the recommendations of a competent naval or military authority it appears to him expedient for securing the public safety or the defence of the realm, is authorised by the Defence of the Realm Consolidation Act, 1914, S. 1 (i) which confers upon the King in Council power during the continuance of the war "to issue *regulation for securing the public safety and the defence of the realm*"; therefore an order under Reg. 14B for the internment of a naturalised British subject of German birth is valid.)

Industrial Disputes Legislation

1954 All 538 (547) (Pr 15) [AIR V 41 C 216] : ILR (1954) 1 All 457 (FB), *Basti Sugar Mills* v. *State of Uttar Pradesh.* (S. 3 of U. P. Industrial Disputes Act, 1947, is not *ultra vires* as unconstitutionally delegating legislative power. It does not confer any general power to pass orders but specifically limits that power to making provision for specified purposes which are enumerated in clauses (a) to (g) of that section. The power granted to the Executive is thus very similar to the power conferred on the Central Government by S. 3 of Essential Supplies (Temporary Powers) Act, 1946, which has been held to be valid : AIR 1952 All 866, Applied.)

1955 NUC (All) 1732 [AIR V 42] (DB), *British India Corporation Ltd.* v. *State Industrial Tribunal, U. P.* (U. P. Industrial Disputes Act (28 of 1947), S. 3 (c) (d), (g)—Section is not *ultra vires* and unconstitutional on ground of delegation of essential legislative powers to a non-legislative body : AIR 1954 All 538 (FB) and AIR 1954 All 550, Foll.)

1954 All 705 (708) (Pr 2) [AIR V 41 C 280], *Lakshmi Devi Sugar Mills Ltd.* v. *U. P. Government.* (Clauses (b) and (c) of Section 3 of the U. P. Industrial Disputes Act, 1947, are valid and not *ultra vires* the Legislature on ground of delegation of essential legislative power to the executive : AIR 1954 All 538 (FB) and AIR 1954 All 550, Foll.)

1954 All 550 (552) (Pr 8) [A I R V 41 C 217] (DB), *British India Corporation, Ltd.* v. *Government of U. P.* (Even on the view that in order to be valid the legislation must lay down a policy for the guidance of the delegates of the power of subordinate legislation, such a policy is laid down in the opening words of S. 3, U. P. Industrial Disputes Act, namely 'securing the public safety or convenience or the maintenance of public order or supplies and services essential for the life of the community, or for maintaining employment'. The power conferred by the Uttar Pradesh Legislature on the State Government by S. 3 of the U. P. Industrial Disputes Act, 1947, to constitute industrial Courts cannot therefore be impugned on the ground that it amounts to the delegation of an essential legislative function. AIR 1954 All 538 (FB) ; A I R 1952 All 866 (FB) and AIR 1951 S C 332, Foll.),

Preventive Detention Act

1950 S C 27 (42, 43) (Pr 27) [AIR V 37 C 6]; 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras,* (S. 3, Preventive Detention Act, is not bad as unconstitutional delegation of legislative power—In fact there is no delegation of legislative power at all in such a case —There is only conferment of a discretion to enforce the law.)

1954 Cal 591 (594) [AIR V 41 C 202] : 1954 Cri L Jour 1722 (DB), *Shri Krishna Sharma* v. *The State of West Bengal.* (It cannot be said that the question whether the impugned provision of S. 3 of the P. D. Act was legislation within the meaning of Arts. 245 and 246 of the Constitution was not decided in *Gopalan's case,* A I R 1950 S C 27. The provision in S. 3 of the P. D. Act is not bad as being an instance of unwarranted delegation of legislative power—Incidentally, if the contention that such provisions are invalid be upheld not only will S. 3 (1) (a) (iii) and S. 3 (2) of the P. D. Act fall, but also the other provisions of S. 3 and with it the entire Act will fall—a sweeping result indeed. The fact that what were essential commodities was laid down in certain statutes, e. g., Essential Supplies Act, etc., cannot be considered to be a valid ground for nullifying the impugned provisions of the Preventive Detention Act.)

Miscellaneous

1955 Nag 246 (253) (Prs 37, 38) [(S) AIR V 42 C 64] (FB), *Balkishan* v. *Totaldas.* (C. P. and Berar Regulation of Letting of Accommodation Act (11 of 1946), S. 2 not invalid on ground of its making an unconstitutional delegation of legislative power.)

('55) 1955 Andhra W R 754 (767), *Veerraju* v. *Dist. Munsiff of Ramachandrapuram.* ((1) Section 112 of the Madras Village Panchayats Act, 1950, confers on the State Government the power to make rules governing the constitution of tribunals for the decision of election disputes. (2) It is only a legislative enactment or a rule having statutory authority that can constitute a Court or invest a Judge with authority to determine matters outside his ordinary jurisdiction. (3) The creation of an authority distinct from a Court is not a legislative function. (4) The Election Commissioner constituted under the rules framed under the Madras Village Panchayats Act, 1950, is not a Court *stricto senso* but he performs the functions assigned to him as a *persona designata.* (5) The conferring of power to frame rules relating to the decision of election disputes on the State Government does not amount to excessive delegation or abandonment of legislative power. (6) The legislative practice in India supports the validity of this type of legislation.

Thus, the rules framed by the Government under S. 112 (2) (1) constituting the Election Commissioner to hear election disputes under the Madras Village Panchayats Act, 1950, are *intra vires* and valid : 1955 N U C (Mad) 2421 [AIR V 42] Foll.)

1955 NUC (Mad) 2421 [AIR V 42], *S. K. Velayutha Mudaliar* v. *District Munsiff, Vridhachalam, South Arcot.* (Rules under Madras Village Panchayats Act (10 of 1950); S. 112 (2) (i) constituting tribunals to hear election disputes are valid. The utilisation of the Government for setting up the machinery for the adjudication of disputes to enable the constitution of the Panchayat Board under the Act is merely a ministerial provision, in respect of which it is competent for the Legislature to employ the Executive for making the rules.

The legislative practice in India also supports the validity of this type of legislation.)

1955 Bom 185 (Pr 6) [(S) AIR V 42 C 49] (DB), *Hirabhai Ashabhai* v. *State of Bombay.* (S. 169 of Bombay Municipal Corporation Act (1888) empowering levy of water charge by measurement not *ultra vires* as unconstitutional delegation of legislative power.)

1955 N U C (Cal) 5922 [AIR V 42], *Gopalchandra Mukherjee* v. *B. C. Das Gupta.* (West Bengal Clinical Establishments Act, 1950, is valid and does not unconstitutionally delegate legislative power to the State Govt.— Wide rule-making power of State Govt. not *ultra vires* — Act has clearly laid down the policy, the policy being to introduce control over clinical establishments within the State and to see that they attain a particular standard and are properly conducted.)

[*See* 1955 N U C (Punj) 1887 [AIR V 42] (DB), *Associated Traders & Engineers* v. *State of Punjab.* (A reading of the Punjab Passengers and Goods Taxation Act (16 of 1952) shows that the authority is given certain *executive powers* and there is no question of delegation of legislative powers. It is really no delegation if the choice of the prescribed authority is left entirely to the State Government : AIR 1952 Pat 359 (FB), Foll.)

1953 Madh B 236 (240) (Pr 11) [AIR V 40 C 88] : 1953 Cri L Jour 1409 (DB). *Mahendra Bahadur* v. *State of M. B.* (Delegation of the character which Arms Act, Section 14 involves cannot on any view be held to be invalid. The legislature has laid down in Section 14 itself the principle that no person shall possess fire-arms except under a license. Such matters as the authority competent to issue licenses, the form in which they should be issued and the terms and conditions on which they should be granted are all matters of detail. Section 17 of the Arms Act does no more than enable the Government to make rules to carry out the principle embodied in Section 14.)

1953 Punj 77 (79) (Pr 5) [AIR V 40 C 26] : ILR (1953) Punj 618 : 1953 Cri L Jour 549 (DB), *Bishambar Nath* v. *State of Punjab.* (Rules issued by State Government under Punjab Excise Act 1 of 1914 not *ultra vires.*)

well-known instances of subordinate legislation may be mentioned rules and bye-laws of municipalities and other local authorities,[10] and rules made by the High Courts[11] under the Civil Procedure Code, etc., rules and regulations made under various enactments, like the Income-tax Act, Sales Tax Act, Stamp Act, etc. If the State Legislature is competent to confer upon the local authority the power to tax, its competency cannot be affected because the power that has been conferred is an unlimited power.[12]

The Legislature cannot delegate any power which it does not itself possess and the nature of functions which it can commit to a municipal body must necessarily be circumscribed by the limits of the area for which the Legislature is competent to legislate.[13]

1952 Mad 127 (134) [AIR V 39 C 62] (DB), *Subba Rao* v. *I. T. Commr., Madras* (Rule-making power under Income Tax Act not *ultra vires* : Held that in framing Rr. 2 and 6 of the Income-tax Rules, the Central Board of Revenue did not exceed the limits of the authority delegated by Ss. 26A and 59 of the Income-tax Act.)

(1894) 1894 App Cas 347 (356, 357) : 63 L J P C 75, *Institute of Patent Agents* v. *Joseph Lockwood.* (Patents, Designs and Trade Marks Act (1888) (51 & 52 Vict c 50), S. 1 (2) — Validity — Legislation is a skeleton piece of legislation left to be filled up in all its substantial and material particulars by the action of the rules to be made by the Board of Trade. The section itself contains no provision with reference to the register or the registrar or proceedings on registration, or any of these matters; but it gives very wide power to the Board of Trade to make such rules as are in their opinion required for giving effect to the section . . . . .It was the intention of the legislature, having expressed the general object, and having provided the necessary penalty, to leave subordinate legislation, so to speak, to be carried out by the Board of Trade.)

(1883) 9 App Cas 117 (132) : 53 L J P C 1, *Hodge* v. *The Queen.* (*Held* : Local Legislature had power by British North America Act, 1867, to entrust to a Board of Commissioners authority to enact regulations in nature of police or municipal regulations of a merely local character for the good government of taverns etc. and thereby to create offences and annex penalties thereto.)]

[10] *See* 1955 Bom 185 (Pr 4) [(S) AIR V 42 C 49], *Hirabhai Ashabhai* v. *State of Bombay.* (Entry 5 in List II, Sch. 7, Constitution of India, is very wide in its terms and legislation is permissible to the State Legislature with regard to any subject of local government and it is also permissible to the State Legislature to confer powers upon a local authority provided the power is for the purpose of local self-government. Now, there can be no doubt that the power of taxation conferred upon the Bombay Municipality is for the purpose of Local Self-Government.)]

[11] (1825) 6 Law Ed. 253 (263) : 10 Wheaton 1 (43), *Wayman* v. *Southard.* (Legislature can delegate *to Courts* rule-making power as regards *merely procedural matters.*)

[12] 1955 Bom 185 (187) (Pr 4) [(S) AIR V 42 C 49], *Hirabhai Ashabhai* v. *State of Bombay.* (Power to levy water charge according to measurement.)

[13] 1955 Bom 185 (Pr 4) [(S)'AIR V 42 C 49] (DB), *Hirabhai Ashabhai* v. *State of Bombay.* (State Legislature cannot confer upon a local authority the power to tax, which power it itself does not possess.)

(1896) 1896 App Cas 348 (364) : 65 L J P C 26, *Attorney-General for Ontario* v. *Attorney-General for the Dominion.*

Where the Legislature competently confers the power of making bye-laws such power would include the power to enforce the bye-laws.[14] But the principle that whenever power is conferred upon the Legislature to pass laws in a field mentioned, the power carries with it the power to pass laws on matters which may be called subsidiary or ancillary, cannot be applied to a body with subordinate powers of legislation and the rules and regulations made by the subordinate agency must be strictly confined to the subject on which the power of passing subordinate legislation has been conferred.[15]

Rules and regulations passed by a subordinate agency under statutory power conferred by the Legislature have the same force as laws made by the Legislature.[16]

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14. 1951 All 44 (55) [AIR V 38 C 7] : ILR (1952) 2 All 360 : 52 Cri L Jour 1191 (DB), *State* v. *Basdeo.*

(1884) 9 App Cas 117 (132, 133) : 53 L J P C 1, *Hodge* v. *The Queen.* ("If by-laws or resolutions are warranted, power to enforce them seems necessary and equally lawful.")

[See however (1892) 36 Law Ed 591 (594) : 144 U S 677 (687), *United States* v. *Eaton.* (It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offence — Regulations by statutory authority may have the force of law—But it does not follow that a breach of a *regulation* is breach of a *law.*)]

15. 1951 Bom 397 (Pr 5, 10) [AIR V 38 C 85] : I L R (1952) Bom 105 : 52 Cri L Jour 1381 (DB), *Agarwal, Ayengar & Co.* v. *The State.* (Contention was that power to regulate production, supply and distribution of, and trade and commerce in, *cotton textiles* conferred upon Central Government by S. 3, Essential Supplies (Temporary Powers) Act includes power to control *any article which is required for making cotton textiles* and that as lickerin wire is necessary for carding cotton, the Central Government was competent to issue orders in regard to it—Contention rejected—Distinction between ancillary powers and implied powers—Subordinate body can claim implied powers but not ancillary matters in such cases—AIR 1941 F C 16 and AIR 1951 Bom 210 (FB) *Ref.*)

[*See also* 1952 Orissa 11 (16) (Pr 11) [AIR V 39 C 2] (DB), *Bishnu Charan* v. *State of Orissa.* (Where the intention of an Act in conferring an express power is frustrated by not construing it as necessarily implying another incidental power, however substantial in nature, the same must be implied in order not to bring about frustration of the express intention. Hence, the power to hold the elections expressly given under S. 1 (5) of the Orissa Municipal Act (23 of 1950) must necessarily be held to imply the power to apply the various relevant provisions of the Act and the rules notwithstanding that the Act itself, in its general application, has not been brought into force.)]

16. (1948) 1 All E R 85 (91) : (1948) 1 K B 349, *Blackpool Corporation* v. *Locker.* (The name 'circulars' would not save them from recognition as delegated legislation. It is the substance and not the form or the name that matters. In delegated legislation law-making is the essential feature and law-making (except in the case of mere codification) means altering the existing law—whether written or unwritten—and, therefore, means interfering with existing right vested in persons affected.)

1918 Mad 763 (778) [AIR V 5] (DB), *In re G. A. Natesan.* (Per Kumaraswami Sastri, J.—The regulations framed under the provisions of the Indian Univer-

A bye-law made under a statute will automatically lapse on repeal of the statute unless the repealing Act provides for the continuance of the bye-law.[17]

The Courts can examine whether rules and regulations made by the Executive or other body under statutory authority are within the statutory power.[18] The validity of such rules, regulations, orders, etc., can also be tested in the light of the Fundamental Rights conferred by Part III of the Constitution. Hence, their *reasonableness* under the clauses of ART. 19 can be examined by the Court.[19]

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sities Act must be read as supplementing the Act, being of the nature of delegated legislation and can be enforced by a writ of mandamus.)

(1915) 237 U S 171 (176) : 59 Law Ed. 900, *Reinman* v. *Little Rock*.

(1894) 1894 App Cas 347 (359, 360) : 63 L J P C 75, *Institute of Patent Agents* v. *Joseph Lockwoods*.

[*See* (1892) 36 Law Ed 591 (594) : 144 U S 677 (687), *United States* v. *Eaton*. (Regulations, prescribed by the President and by the Heads of Departments under authority granted by Congress, may be regulations prescribed by law so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law. But it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offence in a citizen, where a statute does not distinctly make the neglect in question a criminal offence.)]

17. (1916) 1 K B 688 (690) : 85 L J K B 537, *Watson* v. *Winch*.

18. 1955 S C 435 (438) (Pr 4) [(S) A I R V 42 C 71] : 1955 S C R 1444 : 1955 Cri L Jour 1010 (SC), *Bhim Sen* v. *State of U. P.* (U. P. Panchayat Raj Act (26 of 1947), S. 49 (4) — Rules framed under the Act, Rule 84 — Scope of S. 49 (4) — Criminal case—One of parties belonging to a place outside State—Constitution of Bench—Rule 84 is 'ultra vires'—Section 49 (4) does not authorise framing of a rule in so far as it relates to person belonging to a place outside the State.)

(1894) 1894 App Cas 347 (359, 360) : 63 L J P C 75, *Institute of Patent Agents* v. *Joseph Lockwood*. (But it was held that the words that the rules "are to be of the same effect as if they were contained in this Act", precluded the canvassing of their validity in the same way as the Act of Parliament cannot be questioned. If there was a conflict between a section of the Act and a rule the former will prevail but this would be as a matter of *construction* only.)

[*See* (1902) 1 K B 160 (165) : 1901 W N 230, *Gentel* v. *Rapps*. (Where an authority, or body of persons, have been given power to make bye-laws for the preventing of nuisances, they have also power to declare that particular things, if capable of being nuisances, are, when done in their district, nuisances. The very power which is given to them involves their having authority to say what, in particular places and under particular circumstances, shall be nuisances.

The Tramways Act, 1870, enabled the promoters of any tramway to make bye-laws for the prevention of nuisances in any carriage belonging to them. The promoters of a tramway made a bye-law providing "no person shall swear or use offensive or obscene language whilst in or upon any carriage" :

Held that the bye-law was valid although it did not contain any such additional words as "so as to be a nuisance or annoyance to others.")]

19. 1955 Mys 81 (85, 86) [(S) A I R V 42 C 27] : I L R (1955) Mys 203 (DB), *Gopala Chetty* v. *Director of Public Instruction*. (Notification by Director of

Delegation within limits is permissible only by a *Legislature.* The subordinate agency to which the Legislature delegates its power in the type of legislation known as subordinate legislation or conditional legislation cannot delegate its authority to any other person or body.[20] But where an Act confers on a certain body, say, the Central

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Public Instruction prescribing certain copy books for use in schools — Order arbitrary and creating monopoly—Notification quashed.).

[*See also* 1953 S C 373 (375) (Pr 9) [A I R V 40 C 84] : 1953 S C R 1049 (S C), *Raghubir Singh* v. *Court of Wards, Ajmer.* (When a law deprives a person of possession of his property for an indefinite period of time merely on the subjective determination of an executive officer, such a law is unreasonable.)]

20. 1954 Bom 261 (268) [A I R V 41 C 76] : I L R (1954) Bom 647 (DB), *Cantonment Board, Poona* v. *Western India Theatres, Ltd.*

1949 All 32 (Pr 17, 18) [A I R V 36 C 12] ; I L R (1949) All 195 : 50 Cri L Jour 101, *Kunni Lal* v. *Rex.* (The general rule relating to delegation of powers is expressed in the maxim *delegatus non potest delegare.* But there are two exceptions to this rule : one is that a power which is merely ministerial and involves no personal discretion can be delegated, and the other is that a power may be delegated to another person where from the conduct of the parties, the usage of trade or the nature of the particular business which is to be done by the donee of the power, it may reasonably be presumed that the parties originally intended that such authority should exist. These principles, however, can have no application to the delegation of legislative powers. Where a Legislature empowers the executive to make bye-laws or rules or to apply to particular cases or localities laws enacted by it, it is that particular executive authority which is indicated by the Legislature or that person to whom the legislature gives the power of nomination that can act under the power so delegated and no other official can so act. The executive official to whom the power to act has been given by the Legislature or by the nominee of the legislature cannot himself delegate any portion of his powers to any other official unless he is expressly authorised to do so. There can be no implication of the power of delegation in such a case. The Legislature is expected to be precise and complete in the expression of its intentions and when it says that it delegates a power to a particular individual it excludes the possibility of further delegation of that power by the person so empowered.)

1918 Mad 763 (782) [AIR V 5] (DB), *In re G. A. Natesan.*

[*See* 1953 Orissa 233 (234, 235) (Prs 7, 10) [AIR V 40 C 64] : 1953 Cri L Jour 1281 (DB), *Hanantram* v. *State.* (Clause 5, Orissa Cotton Cloth Control Order, is not *ultra vires* as amounting to a second delegation of the powers vested in the State Government by virtue of Notification No. 73 (1) T. A. of 1946 issued by the Central Government under S. 4, Essential Supplies (Temporary Powers) Act, 1946. It is not correct to say that the power to make an order vested in the State Government had been delegated to any officer. That power has been exercised by the State Government itself, and provision for the appointment of the Controller has been made in the Order itself. The administrative functions of Government are, however, entrusted to that officer and he is directed to fix the margin of price in different areas of the State in pursuance of the terms of that Order : AIR 1953 Punj. 1, distinguished. Hence, the Orissa Government Notification No. 29986/ST, D/- 30-7-1949 issued by the Controller, fixing the maximum margin of profit is not *ultra vires* :)

1953 Punj 1 (2) (Prs 10, 12) [AIR V 40 C 1] : ILR (1953) Punj 80 (DB), *The State* v. *Amir Chand.* (Essential Supplies (Temporary Powers) Act (1946), Government, certain powers in regard to a matter, and also enumerates the classes of persons to whom such body may delegate its powers, such delegation will not be *ultra vires* and the provision in the Act which authorises such delegation is not open to question on the ground that the instrumentalities to carry out the Act have not been chosen by the Legislature itself.[21]

12. Retrospective laws. — There is nothing in ARTS. 245 and 246, taken by themselves, which precludes the Indian Legislatures from making retrospective laws. But ART. 245 is expressly made subject to the other provisions of the Constitution. Among these is ART. 20, cl. (1), under which an express prohibition has been enacted against what are known as *ex post facto* laws. That clause consists of two parts. Under the first part, when a certain act is not an offence according to the law in force at the time when the act is done, the person who does that act must not be held guilty of an offence merely because subsequently law is made making such an act offence. Under the second part of the clause where at the time an offence is committed it is punishable with a certain amount of punishment under the law then in force, the law cannot be so changed subsequently as to make him liable in respect of such offence, to a higher punishment. There is no prohibition in the Constitution, except the above one, which prohibits the enactment of retrospective laws by the Legislature.[1] Thus, although the Constitution is not retrospective,

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Ss. 3 and 4—Powers under S. 3 could be delegated by the Central Government either to an officer or authority subordinate to the Central Government, or to a Provincial Government or to an officer or authority subordinate to a Provincial Government. The Central Government delegated its powers under S. 3 to the Provincial Government. No delegation was, however, made either to the District Magistrate or the Director-General of Food and Civil Supplies or the Rationing Controller, Ambala : *Held* that the Provincial Government had no authority to re-delegate this power either to the District Magistrate or to the Director-General of Food and Civil Supplies or to any Rationing Controller.)

(1948) 1 All E R 85 (87) : (1948) 1 K B 349, *Blackpool Corporation* v. *Locker*. (Only Parliamentary and delegated legislation are published — Sub-delegated legislation is not published—Danger of this pointed out.)]

[21] 1954 S C 465 (468) [AIR V 41 C 112] : 1954 Cri L Jour 1322 : 1955 S C R 880 (SC), *Hari Shankar Bagla* v. *M. P. State*.

1952 All 866 (872) (Pr 42) [AIR V 39] : 1952 Cri L Jour 1676 : ILR (1953) 2 All 226 (FB), *Bhushan Lal* v. *State*. (Essential Supplies (Temporary Powers) Act (1946), S. 4—Sub-delegation is permitted only to a definite class of persons or bodies, the selection whereof is to be made by the Central Government S. 4 is not *ultra vires*.)

Article 245 — Note 12

[1] 1952 Madh-B 181 (187) [AIR V 39] (DB), *Shanta Devi* v. *Custodian, Evacuee Property*.

1952 Nag 139 (Pr 18, 19) [AIR V 39] : ILR (1952) Nag 156 (DB), *Chhotabhai Jethabhai Patel & Co.* v. *Union of India*. (Finance Act (1951), S. 7 (2)— It is within competence of Legislature to enact taxing statute with retrospective there is no prohibition against the Legislatures created by the Constitution enacting retrospective laws[2] so as to affect even matters prior to the Constitution.[3] Section 6 of the General Clauses Act, 1897, cannot be invoked in such cases for holding that the effect of the repeal of the Government of India Act, 1935, is to confirm for ever the rights vested in the citizens just before the commencement of the Constitution and to deny to the Parliament and the State Legislatures the power of interfering with those rights by enacting retrospective legislation under the powers conferred on them under ARTS. 245 and 246.[4] It is also the general principle that a

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effect — There is no prohibition in Constitution — S. 7 is not on that account *ultra vires.*)

[*See* 1954 S C 158 (162) [AIR V 41 C 31] : 1954 S C R 541 (SC), *Union of India* v. *Madan Gopal.* (Arts. 245 and 246 read with Sch. 7 List 1 entry 82 empower Parliament to make laws with respect to taxes on income for the whole of the territory of India and no limitation or restriction is imposed in regard to retroactive legislation. It is therefore competent for the Parliament to make a law imposing a tax on income of any year prior to the commencement of the Constitution. It follows that the amendment of S. 2 (14-A) of Income-tax Act by the Finance Act, 1950, so as to authorise the levy of tax on income accruing in the territory of Rajasthan in the year 1949-50 is within the competence of Parliament and therefore valid.)]

2. 1955 Pat 1 (34) (Pr 27) [(S) AIR V 42 C 1]: ILR 33 Pat 690 (SB), *Brij Bhukan* v. *S. D. O. Siwan.* (The powers of legislation given to the Parliament or to the Legislatures of the States are very wide as indicated in Art. 245, and it cannot be doubted that a sovereign Legislature has power to enact prospective as well as retrospective laws.)

1955 NUC (Hyd) 2368 [AIR V 42] (DB), *Commr. of Income-tax, Hyderabad* v. *Ram Gopal Mills Ltd.*

1954 Madh B 206 (208) (Pr 11) [AIR V 41 C 88] : 1954 Cri L Jour 1739 (DB), *The State* v. *Narayan.* (The fact that transfer of cases under S. 10, Criminal Law Amendment Act, would amount to retrospective legislation would not make the Act invalid — Law made by Parliament cannot be impeached merely on ground that it operates *ex post facto*: AIR 1954 S C 158, Rel. on.)

3. 1954 S C 158 (162, 163) (Pr 13, 16) [AIR V 41 C 31] : 1954 S C R 541 (SC), *Union of India* v. *Madan Gopal.*

1952 Madh-B 181 (187) [AIR V 39] (DB), *Shanta Devi* v. *Custodian, Evacuee Property.*

4. 1952 Madh B 181 (187, 188) (Pr. 11) [AIR V 39] (DB), *Shanta Devi* v. *Custodian, Evacuee Property.* (Section 6 of the General Clauses Act which merely lays down one of the general rules of construction of statutes, can have no applicability where the Government of India Act, 1935, is not merely repealed but is substituted by a new Constitution under which the Parliament and the State Legislatures are not prohibited from legislating for the past and from interfering with vested rights. Section 6 of the General Clauses Act would have again no applicability where the Parliament and the State Legislatures with the legislative competence of retrospective legislation pass an enactment giving it in express terms retrospective effect. Thus, the Parliament can make for Madhya Bharat State retrospective legislation with respect to the custody, management and disposal of property declared by law to be evacuee property : AIR 1950 SC 27 and AIR 1952 M B 57, Foll.; A I R 1951 Raj 94, Disting. and Dissent.)

Legislature with plenary powers of legislation has the power to enact retrospective laws so as to affect vested rights unless there is anything in the Constitution which restricts this power.[5] The Court has no power to question the judgment of the Legislature in the matter of giving retrospective effect to legislation.[6]

See also Preamble, NOTE 9.

There is no prohibition in the Constitution against retrospective fiscal legislation as there is against retrospective penal laws.[7] So also, the Legislature is not precluded from enacting a law which is retrospectively applicable to pending proceedings.[8]

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[5] (1942) 1 All E R 287 (290) : (1942) 1 K B 389, *Howard De Walden (Lord)* v. *Inland Revenue Commrs.* ("The fact that the section has to some extent a retroactive effect appears to us of no importance when it is realised that the legislation is a move in a long and fiercely contested battle with individuals who well understand the rigour of the contest.")

(1899) 43 Law Ed 1041 (1053) : 174 U S 445 (478), *Stephens* v. *Cherokee Nation.* (While the general rule is that statutes should be so construed as to give them only prospective operation, yet where the language employed expresses a contrary intention in unequivocal terms, the mere fact that the legislation is retroactive does not necessarily reder it void.)

(1884) 28 Law Ed 704 (707, 708) : 112 U S 249, *Grenada County Supervisors* v. *Brown.* (A municipal subscription to the stock of a railroad company or in aid of the construction of a railroad made without authority previously conferred, may be confirmed and legalized by subsequent legislative enactment, when legislation of that character is not prohibited by the Constitution and when that which was done would have been legal had it been done under legislative sanction previously given.)

[*See* (1932) 101 L J P C 40 (44) : 1932 App Cas 260 (PC), *Abeyesekera* v. *Jayatilake.* (Legislatures have certainly the right to prevent, alter or reverse the consequences of their own decrees —The Ceylon Order in Council, 1928, was not *ultra vires* as affecting to take away rights already in existence, but was no more than an Act of indemnity and relief in respect of penalties incurred.)]

[6] 1953 Nag 40 (Pr. 45) [AIR V 40 C 22] : ILR (1952) Nag 736 (DB), *Bhaskar* v. *Mohd. Alimullakhan.*

[7] 1954 S C 158 (162) [AIR V 41 C 31] : 1954 S C R 541 (SC), *Union of India* v. *Madan Gopal.* (Amendment of S. 2 (14A) of Income-tax Act by Finance Act, 1950, so as to authorise levy of tax on income accruing in the territory of Rajasthan in the year 1949-50 is within the competence of Parliament — AIR 1951 Raj 94 (2), Reversed.)

1952 Nag 139 (142) (Pr 18, 19, 26) [A I R V 39] : I L R (1952) Nag 156 (DB), *Chhotabhai Jethabhai Patel & Co.* v. *Union of India.* (Finance Act (1951), S. 7 (2) is not *ultra vires.*)

[8] 1953 Bom 282 (283) (Pr 3) [A I R V 40 C 87] : I L R (1953) Bom 707 (DB), *Chandulal* v. *Bhau Buwajirao.* (Section 56, Bombay Agricultural Debtors Relief Act (28 of 1947), as amended by Act 70 of 1948, applies to pending proceedings.)

1952 Assam 159 (163) (Pr 8) [AIR V 39] : ILR (1952) 4 Assam 275 (DB), *Union of India* v. *Mohim Chandra.*

(1890) 24 Q B D 557 (560) : 62 Law Tim 768, *Attorney-General* v. *Theobald.*

(1883) 9 Q B D 672 (674, 677) : 52 L J Q B 44, *Quilter* v. *Mapleson.*

Article 372, under which pre-Constitution laws are continued in force after the coming into effect of the Constitution, does not preclude the Legislature from repealing and amending such laws.[9] A similar view was also taken about the effect of the corresponding S. 292 of the Government of India Act, 1935, and it was held that the section did not preclude the Legislature from passing retroactive laws so as to affect enactments previously in force.[10]

Although there is no constitutional prohibition against the enactment of retrospective laws except as provided under ART. 20 cl. (1), as a matter of construction of statutes Courts will not give retrospective effect to an enactment so as to affect vested rights unless the enactment expressly or by necessary implication provides otherwise.[11] But provisions of a statute dealing merely with matters of procedure may properly be construed as having retrospective effect unless such a construction is excluded by the language of the enactment.[12]

It is open to the Legislature acting within the sphere of its constitutional authority to pass a validating statute or to give a retrospective effect to a new statute notwithstanding the fact that the earlier law governing the same matter has been declared by a court of law as invalid, unenforceable or inoperative.[13]

12a. Validating laws.—See under NOTE 6.

13. "Subject to the provisions of this Constitution." — The general principle is that every Legislature which is governed by a written constitution must exercise its powers of legislation subject to limitations imposed by the constitution. As seen in NOTE 3, such a Legislature cannot claim to be a sovereign body like the British Parliament and it is open to the Courts to examine the validity of

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[*See* (1899) 43 Law Ed 1041 (1053) : 174 U S 445 (478), *Stephens* v. *Cherokee Nation*. (While Legislatures cannot set aside judgments of Courts, compel them to grant new trials, or order discharge of offenders, the grant of a new remedy by way of review has been often sustained under particular circumstances.)]

[9] 1951 Bom 438 (Pr 3) [AIR V 38 C 99] : ILR (1952) Bom 590 (DB), *Jamnadas* v. *I. T. Commr.* (Art. 141 does not mean that the law once declared by the Supreme Court cannot be altered by any competent Legislature. In this view, the Act does not offend Art. 141.)

[10] 1941 F C 16 (24) [AIR V 28] (FC), *United Provinces* v. *Atiqa Begam.* (U. P. Regularisation of Remissions Act of 1938 is not *ultra vires*: Reversing AIR 1940 All 272 (FB).)

[11] 1927 P C 242 (244) [A I R V 14] (PC), *Delhi Cloth Mills* v. *I. T. Commr.* (Provisions which, if applied retrospectively, would deprive of their existing finality orders which, when the statute came into force, were final, are provisions which touch *existing rights*: *Colonial Sugar Refining Co.* v. *Irving*, (1905) App Cas 369, Rel. on.)

(1861) 10 C B (N S) 179 (191) : 142 E R 419, *The Midland Railway Co.* v. *Pye.*

[12] 1927 P C 242 (244) [AIR V 14] (PC). *Delhi Cloth Mills* v. *I. T. Commr.*

[13] 1955 Hyd 257 (258, 259) [A I R V 42 C 75] : I L R (1954) Hyd 766 (DB), *Sarvaiah* v. *Narsing Rao.*

its laws in the light of the provisions of the constitution. This principle has been expressly enacted in the beginning of Art. 245. It provides that the legislative powers of the Parliament and the State Legislatures are "subject to the provisions of this Constitution."[1]

The words "subject to the provisions of this Constitution" in Art. 245 are also applicable to Art. 246 and the legislative power conferred by Art. 246 can also be exercised only subject to the limitations imposed by other provisions of the Constitution.[2] Thus, the law-making power of the Parliament and the State Legislatures is subject to the Fundamental Rights enacted in Part III of the Constitution.[3] Article 13 expressly provides that laws inconsistent with Fundamental Rights shall be void.[4] (See Part III— General and

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Article 245 — Note 13

1. 1955 S C 540 (547) (Pr 13) [(S) A I R V 42 C 83] : (1955) 2 S C R 164 (SC), *Umeg Singh* v *State of Bombay*. (The power of State Legislature conferred by Art. 246 to legislate on the matters enumerated in Lists 2 and 3 of the Seventh Schedule is, by virtue of Art. 245 (1), subject to the provisions of the Constitution.)

1950 Orissa 157 (166) (Pr 20) [A I R V 37 C 26] : ILR (1950) Cut 222 : 51 Cri L Jour 1189 (FB), *Prahalad Jena* v. *State*.

[But see 1955 N U C (All) 2681 [AIR V 42], *Rahim Bux* v. *Amin Ullah*. (The object of Article 245 is to define the respective spheres within which the State and the Union Legislatures may legislate. The Article does not mean that if there should be inconsistency between any State law and any provision of the Constitution, the former must be void. Mere inconsistency (assuming such to exist) between Proviso (e) of S. 23 of U. P. Municipalities Act, 1916 and Art. 227 of the Constitution will not make the former void—Submitted wrong.)]

2. 1955 S C 540 (547) (Pr 13) [(S) A I R V 42 C 83] : (1955) 2 S C R 164 (SC), *Umeg Singh* v. *State of Bombay*.

3. 1954 S C 119 (123) (Pr 8) [AIR V 41 C 26] : 1954 S C R 674 (SC), *Dwarkadas* v. *Sholapur Spinning & Weaving Co. Ltd.* (Court to look to the substance of the legislation.)

1950 S C 27 (109) (Pr 216) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

1955 Pat 1 (11) [(S) A I R V 42 C 1] : I L R 33 Pat 690 (SB), *Brij Bhukan* v. *S. D. O. Siwan*. (If a statute, enacted ostensibly for removal and prevention of encroachments on lands which are public property, has little or very unsubstantial relation to those subjects and is a palpable invasion of rights secured by Part III of the Constitution, the Court will have to declare that portion of the statute *ultra vires*.)

1952 Mad 613 (632) (Pr 27) [AIR V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras*.

[*See* 1955 Nag 99 (103) (Pr 15) [(S) AIR V 42 C 23]: I L R (1955) Nag 137 (DB), *Nem Kumar* v. *Commr. of Sales Tax, M. P.* (A right of appeal is a statutory and not an inherent or fundamental right. Hence, the proviso to S. 22 (1) of the C. P. and Berar Sales Tax Act is not *ultra vires* the State Legislature because it imposes a condition of payment of the tax with penalty, if any, before an appeal is admitted.)]

4. 1955 S C 123 (145) (Pr 51) [(S) AIR V 42 C 24]: 1955 S C R 613: 1955 Cri L J 215 (SC), *Behram Khurshid* v. *Bombay State*. (Law infringing fundamental

ART. 13 and the commentary thereon.) Similarly, the powers conferred on the High Courts under ARTS. 226 and 227 cannot be curtailed by legislation.[5]

The meaning and scope of the articles of the Constitution are not controlled by the entries in the Legislative Lists in the Seventh Schedule; on the contrary, the scope and meaning of the entries in the Legislative Lists are controlled by the substantive provisions in the body of the Constitution.[6] Within its own allotted sphere the Legislature has plenary powers of legislation subject only to the express provisions of the Constitution.[7] Hence, the powers of the Legislature cannot be curtailed by invoking any alleged spirit of the Constitution.[8]

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rights is law enacted in *excess* of legislative authority and is null and void—It is not correct to draw a distinction between unconstitutionality due to lack of legislative power and unconstitutionality due to infringement of fundamental rights.)

1950 S C 27 (34) (Para 6) [A I R V 37 C 6] : 51 Cri L Jour 1383 : 1950 S C R 88 (SC), *Gopalan* v. *State of Madras.* (Per Kania C. J. — The provision in Art. 13 is only made *ex abundanti cautela.* Even in its absence, a law inconsistent with fundamental rights would be void.)

1952 Punj 309 (Pr 37, 38) [AIR V 39] : I L R (1952) Punj 381 : 1952 Cri L Jour 1313 (FB), *Ajaib Singh* v. *State of Punjab.*

1952 Pat 166 (172) (Pr 27) [AIR V 39 C 55 (12)] : ILR 30 Pat 1085 (DB), *Bankey Singh* v. *Jhingan Singh.*

[5] 1953 Nag 148 (150) (Pr 8) [AIR V 40 C 50] : I L R (1953) Nag 226 (DB), *Bajranglal* v. *A. D. C., Akola.* (C. P. and Berar House Rent Control Order, 1949, which makes the order of Additional Deputy Commissioner conclusive, cannot derogate from the powers of the High Court.)

1952 Orissa 244 (246) (Pr 4) [AIR V 39] : I L R (1951) Cut 603 (DB), *Jadumani Behera* v. *Jadumani Sahu.*

[But see 1955 N U C (All) 2681 [AIR V 42], *Rahim Bux* v. *Amin Ullah.* (Inconsistency (assuming it to exist) between Proviso (e) of S. 23 of U. P. Municipalities Act (1916) and Art. 227 of the Constitution will not make the former void—Submitted wrong.)]

[6] 1950 Madh B 46 (50) (Pr 10) [AIR V 37 C 25] : ILR (1952) Madh-B 231 (DB), *Harendranath* v. *State.*

[*See* 1952 S C 252 (268) (Pr 30) [AIR V 39] : 1952 S C R 889, 1020, 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.* (In view of the Constitution (First Amendment) Act, 1951, any argument regarding the unconstitutionality of the Bihar Land Reforms Act (30 of 1950) based on the ground that the Act contravened Art. 14, 19 or 31 of the Constitution, does not survive and the Act is not open to challenge on any such ground.)]

[7] 1955 S C 540 (547) (Pr 13) [(S) AIR V 42 C 83] : (1955) 2 S C R 164 (SC), *Umeg Singh* v. *State of Bombay.*

[*See* 1944 P C 7 (11) [AIR V 31] : ILR (1945) Mad 1 (PC), *Abitibi Power Etc. Co.* v. *Montreal Trust Co.*

1944 F C 62 (65) (AIR V 31] (FC), *Kunwar Lal Singh* v. *C. P. & Berar.*

('79) ILR 4 Cal 172 (182) : 5 Ind App 178 (PC), *Empress* v. *Burah.*]

[8] 1950 S C 27 (Pr 26, 132) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

The limitation on the legislative power of the Parliament or of the State Legislatures can only be imposed by the Constitution and not by any contractual obligation undertaken by the Government or devolving on the Government, Central or State,[9] unless there is any provision in the Constitution, as for example, ART. 278, under which it is expressly provided that the powers of the Legislature should be limited by the agreement.[10]

See also NOTE 16; ART. 31, NOTE 25 (k) and (l) and NOTE 27; ART. 294, NOTES 6, 7 and 8.

14. "Law." — The definition in ART. 13 (3) (a), which would include within the meaning of 'law' any ordinance, order, bye-law, rule, regulation or notification, is only applicable to that article and is not applicable to this article. Hence, where an Act was validly passed under the Government of India Act, 1935, the notification issued under that Act after the coming into force of the Constitution is not liable to be tested as regards its validity with reference to the provisions of ARTS. 245 and 246.[1] As to whether the words 'may make laws' will include the power to make laws delegating any part of the law-making authority of the Legislature, see NOTES 8, 9, 10 and 11. It is not necessary that legislation in respect of property and civil rights must be general in character and not aimed at a particular right. Such a restriction would appear to eliminate the possibility of special legislation aimed at transferring a particular right or property from private hands to a public authority for public purposes. The Legislature is supreme in these matters, and its actions must be assumed to be taken with due regard for justice and good conscience. They are not in any case subject to control by the Courts.[2] See also ART. 14, NOTES 8 and 27.

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[9] 1955 S C 540 (548) [(S) AIR V 42 C 83] : 1955-2 S C R 164 (SC), *Umeg Singh* v. *State of Bombay*. (Guarantee contained in agreement with Rulers of former Indian States is no bar to State Legislature enacting law for abolition of jagirs in their territories.)

[10] *See* 1955 Mys 49 (58) (Pr 27) [AIR V 42 C 20] : ILR (1955) Mys 20 (DB), *City Tobacco Mart* v. *I. T. Officer*. (Per Mallappa J.: Courts cannot avoid taking note of the object of the Finance Act, 1950, as found in the agreement between the President and the Rajpramukh of Mysore as the agreement is one recognised by the Constitution and if S. 13 of the Finance Act is not in accordance with the agreement, it is open to the objection that it is constitutionally bad.)

Article 245 — Note 14

[1] 1954 Mad 291 (301) (Pr 18) [AIR V 41 C 125] : I L R (1953) Mad 1175 (DB), *A. M. S. S. V. M. & Co.* v. *State of Madras*. (Madras Estates Abolition and Conversion into Ryotwari Act, 26 of 1948 — Act held valid — Notification under Act after Constitution not invalid as affecting property over which Madras Legislature under Art. 245 had no jurisdiction.)

[2] 1944 P C 7 (11) [AIR V 31] : I L R 1945 Mad 1 (PC), *Abitibi Power etc. Co.* v. *Montreal Trust Co.*

15. Territorial extent of legislative power. — This article defines the territorial limits of the legislative powers of the Indian Parliament and the State Legislatures respectively. Under this article it is provided that the Parliament may make laws for the whole or any part of the territory of India and that the Legislature of a State may make laws for the whole or any part of the State. Under ART. 246 (3), the Legislature of any State, specified in Part A or Part B of the First Schedule, has exclusive power to make laws for such State or any part thereof with regard to any of the matters enumerated in LIST 2 in the Seventh Schedule. The territory of India comprises the territories of the States and the other territories mentioned in ART. 1, cl. (3). So, as regards the territories of the States they come under the legislative jurisdiction of both the Parliament and the Legislatures of the respective States, although as regards the subjects of legislation there is a distribution of such subjects between the Parliament and the State Legislatures.[1]

(a) Extra-territorial laws.

Clause (2) of this article expressly provides that no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.[2] There was a similar provision in S. 99 (2) of the Government of India Act, 1935, although its wording was slightly different from cl. (2) of this article. Hence, it was held that Acts passed by the Central Legislature under the Government of India Act, 1935, could not be held to be invalid on the ground of their extra-territorial operation.[3] A similar provision

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Article 245 — Note 15

[1] *See* 1954 Mad 291 (301) (Pr 18) [AIR V 41 C 125] : I L R (1953) Mad 1175 (DB), *A. M. S. S. V. M. & Co.* v. *State of Madras.* (Case under Government of India Act, 1935—Over the same territory the Province has power of legislation in respect of subjects enumerated in List 2 and the Centre over those mentioned in List 1 with a concurrent power over the subjects set out in List 3.)

[2] 1955 Nag 11 (22) (Pr 43) [(S) AIR V 42 C 4] : I L R (1954) Nag 764 (SB), *Piarelal* v. *State of Madhya Pradesh.* (*Held* that the M. P. Appropriation (No. 2) Act, 1954, did not contravene any provision of the Constitution.)

[*See* 1953 Cal 81 (84, 85) (Pr 41, 42, 55) [AIR V 40 C 24] : 1953 Cri L Jour 310 (DB), *Gour Gopal* v. *Chief Secy.* (Preventive Detention Act, 1950, S. 5 — Detention of person who is outside territorial limits of jurisdiction of Government held not *ultra vires*—*Cf.* AIR 1951 Mad 583.)]

[3] 1948 P C 118 (120) (Pr 13) [AIR V 35 C 34] : 75 Ind App 86 : 1948 F C R 1 (P C), *Wallace Bros.* v. *I. T. Commr., Bombay.*

1945 F C 9 (13) [AIR V 32] : I L R (1945) Kar (FC) 88 : 1945 F C R 65 (FC), *Wallace Bros. & Co.* v. *Income-Tax Commsssioner.*

1944 F C 51 (61, 62) [AIR V 31] (FC), *Governor-General in Council* v. *Raleigh Investment Co. Ltd.*

1948 Bom 87 (93) [AIR V 35 C 20] : ILR (1948) Bom 588 (DB), *I. T. Commr.* v. *A. H. Wadia.* (Indian Legislature was competent to pass extra-territorial Acts.)

1944 Bom 1 (2, 3) [AIR V 31] (DB), *Wallace Bros. & Co.* v. *I. T. Commr., Bombay.*

is contained also in S. 3 of the Statute of Westminster, 1931 (22 Geo. V, c. 4), which runs as follows :

> "It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation."

In view of the clear provisions of cl. (2) of this article, the observations in some decisions[4] about the incompetency of municipal

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[4] 1946 P C 180 (185) [AIR V 33 C 53] (PC), *British Columbia Electric Rly. Co.* v. *King*. (A Legislature which passes a law having extra-territorial operation may find that what it has enacted cannot be directly enforced but the Act is not invalid on that account and the Courts of its country must enforce the law with the machinery available to them.)

1949 F C 18 (24, 25) (Pr 16) [AIR V 36 C 6] : 1948 F C R 121 (FC), *A. H. Wadia* v. *I. T. Commr., Bombay*. (*Obiter*.—Even if the legislation is found to operate extra-territorially, that would be no ground for the municipal Courts to hold it *ultra vires*. Generally, States can legislate effectively only for their own territories, but for purposes of taxation and similar matters, a State makes laws designed to operate beyond its territorial limits. In the case of a sovereign Legislature like the British Parliament, the question of extra-territoriality of any enactment can never be raised in the municipal Courts as a ground for challenging its validity. The legislation may offend the rules of international law, may not be recognised by foreign Courts or there may be practical difficulties in enforcing them, but these are questions of policy with which the domestic tribunals are not concerned. (1893) 1893 App Cas 339, *Ashbury* v. *Ellis* and AIR 1933 P C 16, *Rel. on*.)

1946 F C 27 (30) (Pr 6) [AIR V 33 C 6] : 1946 F C R 94 : ILR (1947) Lah 387 : ILR (1947) Kar F C 1 : 47 Cri L Jour 800 (FC), *Mohammad Mohy-ud-Din* v. *Emperor*. (Assuming that a subordinate Legislature cannot validly make laws imposing punishments on non-subjects for offences committed by them outside the territorial limits of its jurisdiction, there can be no doubt that Parliament can, if it so chooses, authorise even a subordinate Legislature to legislate with extra-territorial effect.)

1948 Bom 87 (93) [AIR V 35 C 20] : I L R (1948) Bom 588 (DB), *I.-T. Commr.* v. *A. H. Wadia*. (It is entirely a matter of legislative policy—No Legislature would pass laws which it could not enforce — But that is not a matter for the Courts.)

[*See* 1955 S C 661 (750) (Prs 199, 200) [AIR V 42 C 101] (SC), *Bengal Immunity Co.* v. *State of Bihar*. ((Per *Venkatarama Ayyar, J., in a dissenting judgment*) : The powers of the Union and the State under Ss. 99 (1) and 100 of the Government of India Act, 1935, as also under Articles 245 (1) and 246 in respect of the matters mentioned in their respective lists have the same content and quality, and if legislation with extra-territorial operation is within the competence of the Union, it is equally within the competence of the State. The words "extra-territorial operation" are used in two different senses as connoting firstly, laws in respect of acts or events which take place inside the State but have operation outside, and secondly, laws with reference to the nationals of a State in respect of their acts outside; in its former sense, the laws are strictly speaking intra-territorial though loosely termed 'extra-territorial' and under Art. 245 (1) it is within the competence of the Parliament and of the State Legislature to enact laws with extra-territorial operation in that sense. The words "laws with extra-

Courts of the country to question the validity of the laws of that country on the ground of their extra-territorial operation are only of academical importance.

(b) State Legislatures.

Reading cls. (1) and (2) of this article[5] together it is clear that the State Legislatures have no power to make laws with extra-State operation.[6] Under the Government of India Act, 1935, also, a Provincial Legislature had no power to make laws with extra-Provincial operation[7] and a similar restriction applied also to the Provincial

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territorial operation" in Art. 245 (2) must be understood in their strict sense as having reference to the laws of a State fcr their nationals in respect of acts done outside the State. Otherwise, the provision would be redundant as regards legislation by Parliament and inconsistent as regards laws enacted by States.)]

[5] Reference must also be made to Art. 246 (3) under which the power of the State Legislature in Parts A and B States to make laws with respect to matters, enumerated in Sch. VII List II is limited to making such laws "for such State or any part thereof".

[6] 1954 Pat 262 (Prs 7, 9) [AIR V 41 C 92] : I L R 33 Pat 22 (DB), *Bhabapritananda Ojha* v. *President of the Bihar State Board of Religious Trusts.* (The general principle is that the exercise of civil jurisdiction is conditioned by territorial limits. The basis of civil jurisdiction is the principle of effectiveness. The principle applies not merely to the jurisdiction of a judicial tribunal but to the exercise of legislative jurisdiction. It must be held that the Legislature of the Bihar State has no power to make laws which would have extra-territorial application or which would affect the decree of a Court which is located outside its jurisdiction. Section 29, Bihar Hindu Religious Trusts Act (I of 1951) must be read in a restricted sense and the Board of Religious Trusts has authority to exercise supervision and control only on such religious trusts of which supervision is vested in a committee appointed by a competent Court within the territorial limits of Bihar. Baidyanath temple is managed under a scheme prepared by the District Court of Burdwan and affirmed by the High Court of Calcutta on appeal. These Courts are located outside the territory of Bihar, and the Bihar Legislature has no jurisdiction to enact legislation directly modifying the decrees of these Courts : (1870) 11 Wall. 423 : 20 Law Ed. 192, *St. Louis* v. *Ferry Co.*, Rel. on.)

1956 Bom 1 (4) (Pr 3) [(S) AIR V 43 C 1] : ILR 1955 Bom 680 (DB), *State of Bombay* v. *Chamarbaugwala.* (State law affecting person or matter with whom or with which there is no territorial nexus is *ultra vires.*)

1954 Mad 291 (297) [AIR V 41 C 125] : ILR (1953) Mad 1175 (DB), *A. M. S. S. V. M. & Co.* v. *State of Madras.* (So, State Legislature cannot legislate about fisheries in extra-territorial waters. In this case, however, it was held that the Act did not attempt to do so and that the legislation was only limited to territorial waters.)

1951 Mad 583 (588) [AIR V 38 C 163] : 52 Cri L Jour 294 (DB), *In re Kumaramangalam.* (The executive power of the State is similarly circumscribed.)

[*See* 1955 Bom 55 (59) (Pr 7) [(S) AIR V 42 C 13], *Fazle Hussein* v. *Yusufally.* (All jurisdiction is in a sense territorial. No State by legislation can confer upon its Courts the authority to deal with the rights and obligations in respect of land not situated within its limit, nor against persons not residing, permanently or temporarily, within the realm.)]

[7] 1947 F C 1 (Pr 10) [AIR V 34 C 1] : 1946 F C R 67 : ILR (1946) Kar (FC) 27 (FC), *Manikkasundara* v. *R. S. Nayudu.* (Madras Temple Entry Authorisa-

Legislatures under the Government of India Act, 1919.[8]

For many purposes, the special laws prevailing in several subdivisions of a single political State of which the forum is a part are as much foreign law as the laws of a State under a foreign political sovereignty.[8a]

This, however, does not mean that a State Legislature has no power at all to make a law affecting matters or persons outside the territorial limits of the State. It only means that the State Legislature cannot make such a law unless there is a *sufficient territorial connection* between the State and the person or matter to which the law is sought to be made applicable.[9] As to the territorial limits of

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tion and Indemnity Act, 1939 not *ultra vires* as affecting the rights of worshippers hailing from other Provinces as the rights affected are only those in respect of the temples situated within the Province.)

[8] *See* 1954 Pat 164 (166) (Pr 5) [AIR V 41 C 63] : I L R 32 Pat 540 (DB), *Maharaj Kishore* v. *Raja Ram.* (U. P. Encumbered Estates Act (25 of 1934)—Provisions having extra-territorial operation *ultra vires.*)

1948 Cal 322 (324) (Pr 4) [AIR V 35 C 133] : ILR (1948) 2 Cal 455 (DB), *Madangopal* v. *Lachmidas.* (U. P. Encumbered Estates Act (25 of 1934) was passed by the U. P. Legislature with the previous sanction of the Governor-General obtained in pursuance of the provisions of S. 80A (3) of the Government of India Act, 1915-1919. But as that Legislature had power to legislate for the peace and good government of that Province only, the Act notwithstanding the fact that previous sanction of the Governor-General had been obtained could only have effect over that Province and not over any other Province of British India. *Prima facie* any provision made in that statute would be *ultra vires* if and so far as it affects the rights of creditors which had originated outside that Province and which had been enforced by suit or sought to be realised by execution outside that Province. It would, therefore, follow, that a decree passed by a Court outside that Province could not be affected in any way so long as it was not sought to be executed within that Province.)

[8a] 1940 Bom 362 (363) [AIR V 27] (DB), *Shankar Vishnu* v. *Maneklal Haridas.* (No doubt, the Province of Bombay and the Central Provinces are both part of British India but where the law of one Province of British India is distinct from the law of another Province, the two Provinces must be regarded for the purposes of the law of contract as foreign countries *inter se.*)

Civil Revn. Case No. 1424 of 1954, D/- 9-2-1956 (Cal) (DB), *R. A. Dickie and Company (Agencies) Ltd.* v. *The Municipal Board, Banaras.*

1930 Cal 53 (54) [AIR V 17], *Chattoo Lal Misser & Co.* v. *Naraindas Baijnath Prasad.* (No local Legislature can prescribe procedure for any Court beyond its territorial jurisdiction and any Act passed by a local Legislature for its own Courts cannot be enforced beyond those territories. As far as Calcutta High Court is concerned, the U. P. Court of Wards Act (4 of 1912) is in the same position as the legislation of a foreign country and though such legislation can define the status of its own citizens and such status will be recognized by foreign Courts, when the actual status of a person is not affected, the municipal law of a foreign country cannot control or affect in any way the procedure of a Court of another country.)

[9] 1955 Bom 439 (445) (Pr 33) [(S) AIR V 42 C 117] : ILR (1955) Bom 1039 : 1955 Cri L Jour 1564 (DB), *Radhabai* v. *Bombay State.* (The words "for the

Province or any part thereof" in S. 99, Government of India Act, mean "for the purposes of the Province or any part thereof." It is competent for a State Legislature to apply its law to acts done outside the State and the validity of such law would depend *not* upon the possession by the Legislature of extra-territorial powers, but upon there being sufficient territorial connection between the State and the act to which it seeks to make the law applicable — Bombay Prevention of Hindu Bigamous Marriages Act (25 of 1946) has been made applicable to marriages contracted outside the State of Bombay, either or both contracting parties to which are domiciled in the State. There is sufficient territorial connection between such marriages and the Bombay State, which is provided by a party to the marriage possessing the domicile of the Bombay State.)

1955 S C 661 (749) (Pr 19) [AIR V 42 C 101] (SC), *Bengal Immunity Co.* v. *State of Bihar.* (Per *Venkatarama Ayyar J., in a dissenting judgment* — A law enacted by the Indian Legislature in respect of the matters enumerated in the appropriate lists would be valid provided it is for the territory entrusted to their charge; whether it was so or not would depend on whether there was sufficient territorial connection between the person who is sought to be charged or proceeded against under the law and the country which enacts the law; and when such connection exists, the law is not strictly speaking extra-territorial, and it is not *ultra vires* on the ground that the person is not residing within the State which enacts the law. A sales tax legislation of a State which is otherwise valid is not *ultra vires* on the ground that the person proposed to be taxed is not resident within the territorial limits of the State: *Case law discussed.*)

1953 S C 274 (276) [AIR V 40 C 63] : 1953 Cri L Jour 1105 : 1953 S C R 677 (SC), *Poppatlal Shah* v. *State of Madras.* (State Legislature can enact law imposing tax on transaction taking place outside the State provided there is sufficient territorial connection between the State and such transaction.)

1953 S C 252 (256) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors Ltd.* (The expression "for such State or any part thereof" in Art. 246 (3) cannot be taken to import into Sch. VII List 2, Entry 54 (Sales Tax) the restriction that the sale or purchase referred to must take place within the territory of that State. All that it means is that the laws which a State is empowered to make must be for the purposes of that State.)

1948 P C 118 (120, 121) [AIR V 35 C 34] : 75 Ind App 86 : 1948 F C R 1 (PC), *Wallace Bros* v. *I. T. Commr., Bombay.*

1956 Bom 1 (4) (Pr 3) [(S) AIR V 43 C 1] : ILR (1955) Bom 680 (DB), *State of Bombay* v. *Chamarbaugwala.* (There must be a territorial nexus between the subject-matter legislated upon by the State Legislature and the State.)

1954 Punj 264 (266) (Pr 7) [AIR V 41 C 129] : ILR (1955) Punj 58 (DB), *Surrendara Transport and Engineering Co. Ltd.* v. *State of Punjab.* (*Prima facie* the jurisdiction of a State is territorial, for States can legislate effectively only for their own territories: A. I. R. 1933 P. C. 16, *Rel. on.* But a tax can also be levied by a State if the real object intended to be taxed (whether the object is a person, some species of property or some business) is within or associated with the State. The relation may consist in presence within the territory, residence, domicil, carrying on business there, or even remoter connection. If a connection exists it is for the Legislature to decide how far it should go in the exercise of its powers: (1937) 56 C. L. R. 337 (Aus), *Broken Hill South Ltd.* v. *Commr. of Taxation, New South Wales*; A. I. R 1953 S. C. 252 and A. I. R. 1953 S. C. 274, *Rel. on.* — *Held*, that it was within the legis-the jurisdiction of a State Legislature in regard to the levy of sales and purchase tax, see ART. 286 and notes thereon.

Under ART. 162, the executive power of the State extends to the matters with respect to which the Legislature of the State has the power to make laws. Hence, the limitation as to extra-territoriality is also applicable to the executive power of the State.[10]

Under the American Constitution also, the States have no extra-territorial powers, while the United States has them.[11] So also, in Canada[12] and Australia,[13] the Provinces have no extra-territorial powers.

(bb) Principle of sufficient territorial nexus and taxation power of a State—See Notes on ART. 286.

(bb) Principle of sufficient territorial nexus and taxation power of a State.

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tive and territorial competence of the State to enact the Punjab Passengers and Goods Taxation Act, XVI of 1952.)

(1937) 56 C L R 337 (Aus), *Broken Hill South Ltd.* v. *Commr. of Taxation, New South Wales*

[10] 1951 Mad 583 (588, 589) (Pr 13, 14, 15) [A I R V 38 C 163] : 52 Cri L Jour 294 (DB), *In re Kumaramangalam.* (*Cf.* however A. I. R. 1953 Cal. 81.)

[11] (1914) 232 U S 299 (305, 306) : 58 Law Ed. 612, *United States* v. *Bennett.* [*See* 1955 N U C (U S A) 2615 [A I R V 42] : 97 Law Ed. 319 (323), *Sidney Steele* v. *Bulova Watch Co.* (Congress in prescribing standards of conduct for American citizens may project the impact of its laws beyond the territorial boundaries of the United States.

But the legislation of the Congress will not extend beyond the boundaries of the United States unless a contrary legislative intent appears.

The United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed. With respect to such an exercise of authority there is no question of international law, but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own Government.

Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although some of the acts are done outside the territorial limits of the United States.

Where there can be no interference with the sovereignty of another nation, the District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction.

Activities of an American citizen are within the jurisdictional scope of Lanham Act against infringement of trade marks, making actionable the deceptive use of trade marks in foreign and inter-state commerce. Thus where he procures in Maxico the registration of a trade mark of an American watch manufacturer and sells there under this trade mark watches assembled from parts imported from the United States, he can be proceeded against under the Lanham Act.

A federal District Court has jurisdiction to give injunctive relief to the plaintiff against the violation of his trade mark by the defendant American citizen in the foreign country, where the Courts of that country have nullified such registration. In such a case there would be no conflict which might afford the defendant a pretext that such relief would impugn foreign law.)]

[12] (1913) 1913 App Cas 283 (298) : 82 L J P C 33, *Royal Bank of Canada* v. *The King.*

[13] (1891) 1891 App Cas 455 (458) : 60 L J P C 55, *Macleod* v. *Att. Gen. for New South Wales.*

(c) Some general presumptions as to extra-territoriality.

Although the municipal Courts of a country are not entitled to question the validity of a law on the ground of its extra-territoriality where the Constitution empowers the Legislature to pass extra-territorial laws, yet, as a matter of construction of statutes, the Court will be guided by certain principles and presumptions when a question as to the extra-territoriality of an Act arises for consideration. *Prima facie*, an Act will only apply to the country by whose Legislature it has been passed unless there is anything in the Act which points to a contrary intention.[14] The area to which and the persons to whom an Act is to apply are to be gathered from the language of the particular enactment.[15] An Act will *prima facie* be taken to apply to all persons including foreigners within the territorial limits to which the Act applies.[16] A law passed by the Legislature of a country may be made applicable to the acts done by subjects of that country in any part of the world whether within or outside the country.[17] (See S. 4 of the Penal Code and S. 188 of the Code of Criminal Procedure.)[18]

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[14] 1953 Cal 81 (84, 85) (Prs 35, 52) [AIR V 40 C 24] : 1953 Cri L Jour 310 (DB), *Gour Gopal* v. *Chief Secretary*. (The fundamental principles that (1) "all legislation is *prima facie* territorial and should be so construed, that (2) in a federation of States no State has, under normal circumstances, extra-territorial powers, and that (3) no detaining authority is normally entitled to order detention outside its own territorial jurisdiction" are not conclusive of the matter. These principles admit the legislative competence to confer extra-territorial powers but lay down that to warrant an intention on the part of the Legislature to enact legislation having extra-territorial effect, it is necessary that the intention must be clearly expressed.)

(1901) 1901 App Cas 102 (108) : 70 L J K B 181, *Cooke* v. *Vogeler Co.* (The Court of Bankruptcy has no jurisdiction to make a receiving order against a foreigner resident abroad who, without coming into the jurisdiction, has in England had a place of business, contracted debts and acquired assets, and has executed abroad an assignment of his property for the benefit of his creditors generally. Such a person is not a "debtor" within the meaning of Bankruptcy Act, 1883, Section 6.)

(1896) 2 Q B 425 (430) : 60 J P 662, *The Queen* v. *Jameson*. (If there be nothing which points to a contrary intention the statute will be taken to apply only to the U. K.)

(1878) 48 L J P 1 (10) : 4 P D 1, *Niboyet* v. *Niboyet*. (If the Legislature of England in express terms applies its legislation to matters beyond its territorial capacity, an English Court must obey the English Legislature, however contrary to the international comity such legislation may be; but unless there be definite express terms to the contrary, a statute is to be interpreted as applicable and as intended to apply only to matters within the jurisdiction of the Legislature by which it is enacted.)

(1909) 2 K B 61 (64) : 78 L J K B 863, *Tomalin* v. *Pearson & Sons, Ltd.* (Do.)

(1858) 2 Deg & J 614 (622, 624) : 44 E R 1127 (1131), *Gope* v. *Doherty*. (Do.)

(1879) 12 Ch D 522 (528, 529) : 41 L T 46, *Ex parte Blain*; *In re Sawers*. (All legislation is *prima facie* territorial, that is to say, the legislation of any country binds its own subjects and the subjects of other countries who for the time bring themselves within the allegiance of the legislating power. The English Court of Bankruptcy has no jurisdiction to make an adjudication of Bankruptcy against a *foreigner, domiciled and resident abroad*, who has never been in England, even though he is a member of an English firm which has traded and contracted debts in England, and against whom an execution in respect of a judgment debt above £50 has been levied by seizure and sale of goods of the firm in England. In such a case the Court ought not to make an order for service out of the jurisdiction of the Bankruptcy petition on a foreigner.)

[*See* (1937) 1 All E R 249 (256) : 106 L J P C 17, *Forbes* v. *A.-G. of Manitoba*. (It may be accepted as a general principle that States can legislate effectively only for their own territories as was said in *Croft* v. *Dunphy*, AIR 1933 P C 16 (PC).)]

[*See also* (1946) 1 All E R 79 (81, 82), *United Africa Co. Ltd.* v. *Owners of M. V. Tolten, The Tolten.* (The English High Court, under S. 22 (1) (a) (iv), (English) Supreme Court of Judicature (Consolidation) Act, 1925, has admiralty jurisdiction to adjudicate on an action *in rem* for damage by a British ship to immovable property in a foreign country. The High Court exercising admiralty jurisdiction may be considered as an international Court in this sense, that it exercises jurisdiction *in rem* over foreign and British ships alike in respect of damage done by such ships, whether the damage has been done in British waters, or on the high seas, or in foreign waters: *Affirmed in* United Africa Co. Ltd. v. Owners of M. V. Tolten, The Tolten, (1946) 2 All E R 372.)]

[15] (1896) 2 Q B 425 (430) : 60 J P 662, *The Queen* v. *Jameson.*

[16] (1896) 2 Q B 425 (430) : 60 J P 662, *The Queen* v. *Jameson.*

[17] (1896) 2 Q B 425 (430) : 60 J P 662, *The Queen* v. *Jameson.*
(1861) 9 H L C 193 (225) : 11 E R 703 (716), *Brook* v. *Brook.*

[18] Criminal P. C., S. 188 : "When an offence is committed by—

(a) any citizen of India in any place without and beyond India; or
(b) any person on any ship or aircraft registered in India, wherever it may be

he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found :

Provided that notwithstanding anything in any of the preceding sections of this Chapter no charge as to any such offence shall be inquired into in India unless the Political Agent, if there is one, for the territory in which the offence is alleged to have been committed, certifies that, in his opinion, the charge ought to be inquired into in India; and, where there is no Political Agent, the sanction of the State Government shall be required :

Provided, also, that any proceedings taken against any person under this section which would be a bar to subsequent proceedings against such person for the same offence if such offence had been committed in India shall be a bar to further proceedings against him under the Indian Extradition Act, 1903, in respect of the same offence in any territory beyond the limits of India."

Penal Code, S. 4 : "The provisions of this Code apply also to any offence committed by —

(1) any citizen of India in any place without and beyond India;
(2) any person on any ship or aircraft registered in India wherever it may be.

Explanation.—In this section the word 'offence' includes every act committed outside India which, if committed in India, would be punishable under this Code.

An Act will not be construed, if possible, as applying to foreigners in respect of acts done by them outside the country by which the Act is passed.[19] But the benefit of an Act, apart from the burden of the obligation created by the Act, may be presumed to apply to foreigners also.[20] The law of a country does not apply to foreign property.[21]

Illustrations.

A, (who is a citizen of India) commits a murder in Uganda. He can be tried and convicted of murder in any place in India in which he may be found.

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19. (1896) 2 Q B 425 (430) : 60 J P 662, *The Queen* v. *Jameson*. (That is a rule based on international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory.)

1955 N U C (U S A) 1499 [A I R V 42] : 97 Law Edn. 1254, *J. Lauritzen* v. *Evald Joham Larsen*. (It has long been accepted in maritime jurisprudence that if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law, by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory. This is not, as sometimes is implied, any impairment of sovereignty, or limitation of the power of the enacting nation. The law of the sea is in a peculiar sense an international law, but application of its specific rules depends upon acceptance by the nation.)

(1876) 2 Ex D 63 (220) : 2 Q B D 90, *The Queen* v. *Keyn*. (In the absence of statutory enactment the Central Criminal Court had no power to try offence of manslaughter committed by a foreigner in command of a foreign ship passing within three miles of the shore of England.)

(1857) 7 Cox C C 277 (280) : 26 L J M C 104, *Reg.* v. *Lewis*. (A foreigner died at a place in England of injuries inflicted by another foreigner on board a foreign ship whilst at sea :

Held, "in the present case the injury which caused the death was inflicted by one foreigner upon another on board a foreign vessel upon the high seas, and consequently if death had then and there followed no offence cognizable by the laws of this country would have taken place. The 8th section of the 9 Geo. 4, C. 31, therefore is inapplicable and unless it be applicable, the conviction cannot be sustained. It must therefore be quashed and the prisoner discharged.")

(1854) 4 H L C 815 (970) : 10 E R 681, *Jefferys* v. *Boosey*. (Generally we must assume that the Legislature confines its enactments to its own subjects over whom it has authority, and to whom it owes a duty in return for their obedience. Nothing is more clear than that it may also extend its provisions to foreigners in certain cases and may, without express words, make it appear that such is the intendment of these provisions. But the presumption is rather against the extension and the proof of it is rather upon those who would maintain such to be the meaning of the enactments.)

20. (1901) 2 K B 606 (614) : 70 L J K B 788, *Davidson* v. *Hill*. (The Fatal Accidents Acts, 1846 and 1864, apply as well for the *benefit* of the representatives of a deceased foreigner as for those of a British subject at all events as against an English wrong doer.)

21. (1872) L R 5 H L 524 (531) : 41 L J Ch 611, *Attorney-General* v. *Campbell*. ("You cannot apply an English Act of Parliament (Succession Duties Act) to foreign property whilst it remains foreign property; but after the purposes of administration have been answered and distribution made, if a party taking

A foreigner suing in the courts of a country is bound by the law of procedure, including limitation, of that country.[22]

Even on the footing that a Legislature has no extra-territorial jurisdiction, the existence of *any* sufficient territorial connection between a State and an individual will enable the State to tax such individual although he may not be resident within the State or the subject-matter may not be situated within the State.[23]

(d) Territorial waters.

The territory of a State includes the territorial waters or marginal belt of the sea adjoining the territory of the State, at least so far as the right of fishery is concerned.[24] The law is not finally

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this distributive part comes to this country and invests it upon trusts, it assumes the character of a British settlement and British property and is no longer to be dealt with as if it was merely a portion of a foreign testator's estate to be received in the course of administration.")

[*See* (1898) 1898 App Cas 769 (774) : 67 L J P C 144, *Harding* v. *Commissioners of Stamps for Queensland.* (Power of State to levy succession duty on estate of person of foreign domicile.)]

[22] (1843) 4 Moo P C 300 (305) : 13 E R 318 (320), *Lopez* v. *Burslem.*

[23] 1953 S C 252 (256) (Pr 9) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors Ltd.*

1949 F C 18 (24, 25) (Prs 12, 13, 86, 92) [AIR V 36 C 6] : 1948 F C R 121 (FC), *A. H. Wadia* v. *I.-T. Commr., Bombay.* (So long as a statute selects some fact or circumstance which provides some connection with the country and adopts this as the ground of its interference, the enactment is not extra-territorial and its validity would not be open to challenge. The connection may be made the occasion or subject of an imposition of liability. But the connection must be a real one and the liability sought to be imposed must be pertinent to that connection. But it is of no importance upon the question of validity that the liability imposed is, or may be, altogether disproportionate to the territorial connection. This affects the policy and not the validity of the legislation : *A I R 1944 Bom 1; (1935) 51 Com L R 172, Colonial Gas Association Ltd.* v. *Federal Commissioner of Taxation; (1934) 50 Com L R 581, Wanganui Rangitihei Electric Power Board* v. *Australian Mutual Provident Society; (1937) 56 Com L R 337, Boken Hill South Ltd.* v. *Commissioner of Taxation, New South Wales; AIR 1944 F C 51 and AIR 1948 P C 118, Rel. on.)*

1948 P C 118 (120, 121) [AIR V 35 C 34] : 75 Ind App 86 : 1948 F C R 1 (PC), *Wallace Brothers* v. *I.-T. Commr., Bombay.* (Thus foreign company deriving the larger part of its income from British India has *sufficient* territorial connection with British India and income-tax may be levied on it : *A I R 1945 F C 9*, affirmed in appeal.)

1953 Mad 116 (126) [A I R V 40 C 36] (DB), *C. G. Naidu & Co.* v. *State of Madras.* (The power of a State to impose taxes is not conditioned on the subject-matter being wholly within its jurisdiction. The exercise of the power will be valid, if there is sufficient territorial connection with reference to the subject-matter : 1948 F L J 32, Foll.)

1953 Pat 87 (91, 92) [A I R V 40 C 36] : I L R 32 Pat 19, *Bengal Immunity Co.* v. *State of Bihar.*

[24] 1954 Mad 291 (299) [AIR V 41 C 125] : ILR (1953) Mad 1175, *A. M. S. S. V. M. & Co.* v. *State of Madras.*

settled as to the extent of territorial waters.[25] The rule that the marginal belt extends to three miles from the coast, though reasonable, cannot in its simplicity be adopted in a case where the margin of belt does not open into the ocean but is screened by a row of islands lying in close proximity to the shore beyond the territorial waters and further on there are landlocked and inland bays bounded by an island. Where an island is situate within the three mile limit, the belt of waters round it will constitute territorial waters. This belt will be three miles wide and will be measured from low water mark following the sinuosities of the island. If the island is more than three but not more than six miles from the coast, then the whole extent of waters would be territorial since it would be inadvisable to allow any strip of high seas between the coast and the island. Where the island is more than six miles from the shore but only slightly so, then it would appear reasonable to permit a State to claim a small extension of its marginal belt in order to establish a uniform regime of its territorial waters.[26] A State has sovereignty over a bay which is bounded on all sides by territory of the same State and which is in effective occupation of such State.[27] (See ART. 1, NOTE 6.)

It is a principle of international law that for purposes of police, revenue, public health, fisheries, etc., a State may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of territorial waters.[28]

16. Constitutional validity of statutes — General principles.—As seen in NOTE 13, the law-making power conferred by this article on the Parliament and the State Legislatures is subject to the other provisions of the Constitution like the chapter on Fundamental Rights. Unlike the British Parliament which is a sovereign body and

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25. 1954 Mad 291 (299) (Pr 13) [A I R V 41 C 125] : ILR (1953) Mad 1175, *A. M. S. S. V. M. & Co.* v. *State of Madras.* (There has been some divergence of juristic opinion on the extent of the marginal (territorial) waters. Various tests have from time to time been propounded for defining them such as the range of cannon-shot, the limit of usual horizon and so forth. This was one of the three subjects discussed in the Hague Codification Conference, 1930, which ended without any agreement being reached. It cannot, therefore, be said that the law on the subject is finally settled.)

26. 1954 Mad 291 (299) (Pr 14) [A I R V 41 C 125] : I L R (1953) Mad 1175, *A. M. S. S. V. M. & Co.* v. *State of Madras.*

27. 1954 Mad 291 (299) [A I R V 41 C 125] : ILR (1953) Mad 1175, *A. M. S. S. V. M. & Co.* v. *State of Madras.*

28. 1933 P C 16 (17) [AIR V 20] (PC), *Croft* v. *Dunphy*. *(Le Louis, (1817) 2 Dodson 210, Rel. on.)*
[*See also* 1954 Mad 291 (299, 300) [A I R V 41 C 125] : I L R (1953) Mad 1175, *A. M. S. S. V. M. & Co.* v. *State of Madras.* (Chank fisheries off the coast of Ramanathapuram District in the Madras State are within territorial waters : *ILR 27 Mad 551, Foll.*)]

the laws passed by which cannot be impugned as invalid in any court of law, the Indian Legislature is a body, the laws passed by which are open to examination in a court of law in respect of their constitutional validity.[1] (See also NOTE 3). An Act passed by the Legislature which is repugnant to the provisions of the Constitution is *ultra vires* and is void.[2]

Article 245 — Note 16

[1] 1951 Hyd 1 (5) (Pr 14) [A I R V 38 C 1] (FB), *Mahbub Begum* v. *Hyderabad State.*

1950 Cal 274 (276, 277, 278) (Prs 3, 4) [AIR V 37 C 97]: 51 Cri L Jour 1110 (SB), *Sunil Kumar* v. *West Bengal Government.*

1956 Bom 1 (4) (Pr 3) [(S) A I R V 43 C 1] : I L R (1955) Bom 680 (D B), *State of Bombay* v. *Chamarbaugwalia.* (Tests of validity—Whether the subject matter falls within the relevant legislative list, whether the law attempts to transgress the territorial limits of the jurisdiction of the Legislature, whether any other limitation imposed by the Constitution has been transgressed.)

[2] 1955 S C 123 (145) (Pr 50) [(S) A I R V 42 C 24] : 1955 Cr L Jour 215 : 1955 S C R 613 (S C), *Behram Khurshid* v. *Bombay State.*

1951 All 257 (295) [A I R V 38 C 51] : I L R (1951) 1 All 269 (F B), *Moti Lal* v. *Uttar Pradesh Govt.*

1951 Hyd 11 (16) [A I R V 38 C 2] : I L R (1951) Hyd 1 : 52 Cr L Jour 1333 (F B), *Abdur Rahim* v. *J. A. Pinto.*

1955 All 193 (202) [(S) A I R V 42 C 68] : 1955 Cr L Jour 623, *Ram Manohar Lohia* v. *Supdt. Central Prison.* (If any provision is unconstitutional, it can be ignored as if it did not exist, without affecting the enforcement of the others.)

(1923) 67 Law Ed 785 (791) : 261 U S 525, *Adkins* v. *Children's Hospital.*

(1886) 30 Law Ed 178 (186) : 118 U S 425, *Norton* v. *Shelby County.* ("An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.")

(1803) 2 Law Ed 60 (73) : 1 Cranch 137 (177), *Marbury* v. *Madison.* (An Act of Congress repugnant to Constitution cannot become a law — The Courts of U. S. are bound to take notice of the Constitution.)

[*See* 1942 F C 27 (30, 31) [AIR V 29] (F C), *Megh Raj* v. *Allah Rakhia.* (When the substantive provisions of an impugned Act are to any extent void or inoperative any attempt to exclude attack on them by barring the jurisdiction of civil Courts will be open to criticism as "an attempt to do by indirect means" something which the Provincial Legislature was not entitled to do : *(1940) 1940 App Cas 513, Lethbridge Irrigation Trustee's Board* v. *Independent Order of Foresters, Rel. on.*)

1951 Bom 33 (37) (Pr 4) [AIR V 38 C 13]: I L R (1951) Bom 546 : 52 Cri L Jour 418 (DB), *In re Maganlal Jivabhai.* (Where there is a conflict between an Act of a Legislature, which is enacted by it under a particular power given to it by Constitution, and the Constitution itself, then the words of the Constitution must prevail.)]

[But see 1955 N U C (All) 2681 [A I R V 42], *Rahim Bux* v. *Amin Ullah.* (Object of Art. 245 is only to define the respective spheres within which the State and the Union Legislatures may legislate—Article does not mean that if there should be inconsistency between State law and Constitution, the former must be void—Submitted wrong. *See* Kania C. J.'s view in *A I R 1950 S C 27 (34)* that the provisions of Art. 13 (1) and (2) are only *ex abundanti cautela*

Once a law has been struck down as unconstitutional law by a Court, no notice can be taken of that law by a Court.[3] The unconstitutionality of a statute is not capable of waiver by the party affected.[4] But the effect of a judgment of a Court declaring an Act to be *ultra vires* is not the same as the *repeal* of the Act and the Act does not cease to be in existence in the sense that it cannot thereafter be validated by means of an amendment.[5]

In determining the constitutionality of an Act the Court must have regard only to the provisions of the Constitution[6] and not to any extraneous matters. In *Empress* v. *Burah*,[7] the Judicial Committee of the Privy Council observed as follows :

"The established courts of justice, when a question arises

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and that even in their absence, law in breach of fundamental rights would be void.)]

[3] 1955 S C 123 (146) [(S) A I R V 42 C 24] : 1955 Cri L Jour 215 : 1955 S C R 613 (SC), *Behram Khurshid* v. *Bombay State*. (Once a statute is declared void under Art. 13 (1) or 13 (2) by this Court, that declaration has the force of law and the statute so declared void is no longer law *qua* persons whose fundamental rights are thus infringed.)

[4] 1955 S C 123 (146) (Pr 52) [(S) A I R V 42 C 24] : 1955 Cri L Jour 215 : 1955 S C R 613 (S C), *Behram Khurshid* v. *Bombay State*. (No waiver of unconstitutionality—It is not open to an accused person in a criminal case to waive his constitutional right and get convicted — Cooley's Constitutional Limitations, Vol. I, p. 371, referred to—There the Author says that a party may consent to waive rights of property but the trial and punishment for public offences are not within the province of individual consent or agreement—Without expressing any final opinion, the majority said, they were convinced about the relevancy of this theory of waiver in construing fundamental rights under our Constitution—The fundamental rights have not been put in merely for individual benefit.)

[5] 1952 Punj 55 (57) (Pr 3) [A I R V 39 C 15] : I L R (1951) Punj 480 (DB), *Gurdial Kaur* v. *The State*. (The effect of the judgment of the *High Court* declaring an impugned Act invalid is not that the impugned Act never existed or has ceased to exist, but only that so long as the judgment is not overruled the Courts in the State will decline to recognise the impugned Act. Therefore there can be no objection to an amending Act or Ordinance on the ground that it validates something which could not be validated. If the Act as amended is constitutional it will be enforced.)

[*See* 1955 S C 123 (Pr 66) [(S) A I R V 42 C 24] : 1955 Cri L Jour 215 : 1955 S C R 613 (S C), *Behram Khurshid* v. *Bombay State*. (*S. R. Das J.* held, (dissenting from the majority view) that the onus of proving the facts to show that his case came within the portion of the statute which had been declared *ultra vires*, was on the *accused* in a criminal case, and observed : "To adopt the contrary view will be to ignore the sound principle well established in law that a judicial declaration of invalidity does not repeal, alter or amend a statute.")]

[6] 1955 S C 540 (548) [(S) AIR V 42 C 83] : 1955 2 S C R 164 (S C), *Umeg Singh* v. *State of Bombay*. (Limitations on legislative power of Legislature with plenary powers of legislation cannot be imposed by obligations undertaken by or devolving on Government.)

[*See* 1941 Lah 177 (181) [A I R V 28] (F B), *Megh Raj* v. *Allah Rakhia*. (The incidence of legislation cannot affect its validity.)]

[7] ('79) I L R 4 Cal 172 (180, 181) : 5 Ind App 178 (193, 194) (P C).

whether the prescribed limits have been exceeded, must of necessity determine that question ; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited . . . . it is not for any court of justice to enquire further or to enlarge constructively those conditions and restrictions."

In *Attorney-General for Ontario* v. *Attorney-General for Canada*,[8] Earl Loreburn observed as follows :

"In the interpretation of a completely self-governing constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act."

One of the questions that arises, while determining the constitutional validity of a law, is whether the subject-matter of the law, falls within the competence of the Legislature which has passed the law.[9] In determining this question, the Preamble to the enactment is not conclusive.[10]

The reasonableness, propriety, wisdom or expediency of a legislative enactment is irrelevant in considering the question of the validity of the enactment,[11] except in cases in which the Constitution

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[8] (1912) 1912 App Cas 571 (583) : 81 L J P C 210.

[9] 1955 Bom 28 (33) (Pr 10) [(S) AIR V 42 C 7] : I L R (1955) Bom 127 (DB), *Gangadhar Rao* v. *State of Bombay*. (If the Legislature is not *competent* to pass a certain law no question of violation of fundamental rights arises.)

[10] 1950 F C 67 (69) (Pr 8) [AIR V 37 C 6] : 1949 F C R 657 : 51 Cri L Jour 1011 (F C), *Rex* v. *Basudeva*.

[11] 1952 S C 252 (278) (Pr 71) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (S C), *State of Bihar* v. *Kameshwar Singh*.

1950 S C 27 (80) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras*. (Act cannot be declared void simply on the ground of unjust and oppressive provisions or because it is supposed to violate natural, social or political rights of citizens unless it can be shown that such injustice is prohibited or such rights are guaranteed or protected by the Constitution.)

1945 P C 48 (53) [AIR V 32] : 72 Ind App 57 : 1945 F C R 161 : I L R (1945) Kar P C 97 : 46 Cri L Jour 589 (P C), *Emperor* v. *Benoari Lal*.

1943 P C 76 (77) [AIR V 30] (P C), *A.-G. of Alberta* v. *A.-G. of Canada*.

1939 P C 53 (57, 58) [AIR V 26] (P C), *A.-G. of Alberta* v. *A.-G. of Canada*. (Law imposing taxes on Banks—Contention that the rate of tax is excessive and that if similar tax is imposed by all the Provinces the effect would be to prevent banks from carrying on business—*Held*, this argument could be considered and the argument that it was not for the Court to consider the wisdom of the Legislature could not prevail where the taxation in a practical business sense is prohibitive.)

1950 F C 59 (66) (Pr 24) [AIR V 37 C 5] : 1949 F C R 693 : I L R 29 Pat 185 : 51 Cri L Jour 921 (FC), *Lakhi Narayan Das* v. *Province of Bihar.*

1944 F C 1 (5) [AIR V 31]: 45 Cri L Jour 413 (FC), *Piare Dusadh* v. *Emperor.*

1943 F C 29 (35) [AIR V 30] (F C), *Jagannath Baksh* v. *United Provinces.*

1939 F C 1 (4) [AIR V 26] (FC), *In re C. P. Motor Spirit Act.*

1951 Hyd 11 (16) (Pr 35) [AIR V 38 C 2] : 52 Cri L Jour 1333 : I L R (1951) Hyd 1 (F B), *Abdur Rahim* v. *J. A. Pinto.*

1955 Assam 249 (262) (Pr 30) [(S) AIR V 42 C 59] (S B), *H. P. Barua* v. *State of Assam.* (The Courts are not concerned with any hardship that a piece of legislation may cause where it is obviously within the competence of the Legislature. They have no power to relieve hardship in such cases.)

1955 N U C (Hyd) 5624 (AIR V 42], *Mohammad Kasim Razvi* v. *The State of Hyderabad.*

1952 Bom 296 (297) (Pr 2) [AIR V 39] : I L R (1952) Bom 766 (DB), *Mulchand* v. *Mukund.* (The power, which the Courts have, to consider the validity of statutory rules is a very limited power. If a rule is within the ambit of the statute, then it cannot be successfully challenged on the ground that it is an unreasonable rule. Reasonableness, before the Constitution was enacted, was a matter of policy which was left to the Legislature and a law or a rule could only be challenged on the ground of its being *ultra vires* of the Legislature or the rule-making authority. But if it was within the competence of the Legislature or the rule-making authority, the law or rule could not further be challenged on the ground that it was not a reasonable law. Statutory rules formed part of the statute and if they were within the scope of the statute and permitted by the statute to be framed, then they could not be challenged on the ground of unreasonableness. In this respect statutory rules stand on a different and distinct footing from bye-laws; while a bye-law may be challenged on the ground that it is unreasonable, a statutory rule cannot be so challenged. Bye-laws of municipalities and corporations are made in exercise of the inherent power of corporations to carry out their purposes. So Courts have retained some power to question their reasonableness.)

1950 Pat 228 (230) (Pr 4) [AIR V 37 C 56] : 51 Cri L Jour 936 (DB), *Tabarak Khan* v. *Province of Bihar.* (So long as legislation is within the *power* of the Legislature, it is not for Courts to ignore it merely because it interferes with the liberty of the subject.)

(1947) 116 L J R 836 (841, 842) : 1947 App Cas 87, *Co-operative Committee on Japanese Canadians* v. *Att.-Gen. of Canada.*

(1940) 84 Law Ed 1263 (1272) : 310 U S 381 (394), *Sunshine Anthracite Coal Company* v. *Adkins.*

(1937) 301 U S 619 (644) : 81 Law Ed 1307, *Helvering* v. *Davis.*

(1907) 1907 App Cas 93 (95) : 76 L J P C 29, *Tilonko* v. *Attorney-General of Natal.*

(1899) 1899 App Cas 580 (585, 587) : 68 L J P C 118, *Union Colliery Co. of British Columbia* v. *Bryden.*

[*See also* 1944 P C 7 (11) [AIR V 31] : I L R (1945) Mad 1 (P C), *Abitibi Power etc. Co.* v. *Montreal Trust Co.* (Actions of Legislature must be assumed to be taken with due regard for justice and good conscience.)]

itself makes the reasonableness of a provision for certain ends a matter for consideration for Courts in determining its validity as, for example, under ART. 19. Nor is the court concerned with the motives of the Legislature.[12] (See also ART. 246, NOTE 11.)

The Court is only concerned to interpret the law, and if it is valid, to apply the law as it finds it and not to enter upon a discussion as to what the law should be.[13]

In *In re C. P. Motor Spirit Act*,[14] Gwyer, C. J., of the Federal Court observed as follows referring to the principles by which the Federal Court would be guided in such matters :

> "It will adhere to canons of interpretation and construction which are now well known and established. It will seek to ascertain the meaning and intention of Parliament from the language of the statute itself ; but with the motives of Parliament it has no concern. It is not for the Court to express, or indeed to entertain, any opinion on the expediency of a particular piece of legislation, if it is satisfied that it was within the competence of the Legislature which enacted it : nor will it allow itself to be influenced by any considerations of policy, which lie wholly outside its sphere."

Uniform, long continued and undisputed legislative practice may support the validity of an enactment in cases of ambiguity of the material constitutional provisions.[15]

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[12] 1939 F C 1 (4) [AIR V 26] (F C), *In re C. P. Motor Spirit Act.*

1952 All 746 (749) (Pr 12) [AIR V 39] : I L R (1953) 1 All 29 (DB), *Cracknell* v. *State of Uttar Pradesh.* (The intention with which a provision of law is made is hardly relevant for the consideration of the question if it is void as infringing any provision in the Constitution. If it does infringe, then whatever the intention may be, it is void. That a piece of legislation is intended for the benefit of the class to which the person impugning the Act belongs is immaterial if it is otherwise unconstitutional, e. g., Act for taking over management of estate by Court of Wards which is bad on account of discrimination.)

(1918) 62 Law Ed 1101 (1107) : 247 U S 251, *Hammer* v. *Dagenhart.*

[13] 1956 S C 20 (26) (Pr 16) [(S) AIR V 43 C 7] (SC), *Purshottam* v. *B. M. Desai.*

[14] 1939 F C 1 (4) [AIR V 26] (F C).

[15] 1951 S C 332 (344) (Pr 34) [AIR V 38 C 56] : 1951 S C R 747 (790) (S C), *In re Delhi Laws Act, 1912.* (Per Kania, C. J. — Unless legislative practice is overwhelmingly clear, tolerance and acquiescence in the existence of an Act without disputing its validity in a Court for some years may not be considered binding when a question is raised in a Court.)

1955 N U C (Mad) 2421, *S. K. Velayutha Mudaliar* v. *Dist. Munsiff Vridhachalam, South Arcot.* (The content of legislative power granted by the Constitution should be measured by the manner in which the same has been utilised before the Constitution. In other words, the entry in the legislative list conferring upon the Legislature a power in relation to a subject would include in the light of this legislative practice, a right to legislate in the manner in which it was hitherto done.)

There is a presumption in favour of the validity of an enactment passed by a Legislature with plenary powers.[16]

[*See* 1948 P C 118 (120) [AIR V 35 C 31] : 75 Ind App 86 : 1948 F C R 1 (P C), *Wallace Bros.* v. *I. T. Commr., Bombay.* (Where Parliament has conferred a power to legislate on a particular topic it is permissible and important in determining the scope and meaning of the power to have regard to what is ordinarily treated as embraced within that topic in the legislative practice of the United Kingdom : *See (1933) A C 156 at p. 165* : *AIR 1933 P C 16, Croft* v. *Dunphy.* (The point of the reference is not to seek a pattern to which a due exercise of the power must conform. The object is to ascertain the general conception involved in the words used in the enabling Act.)]

[*See* (1936) 81 Law Ed 255 (267) : 299 U S 304 (329), *United States* v. *Curtiss Wright Export Corpn.* (Uniform, long continued and undisputed legislative practice resting on an admissible view of the Constitution goes a long way in the direction of proving the presence of unassailable grounds for the constitutionality of the practice.)]

[16] 1942 F C 17 (20) [A I R V 29] : 43 Cri L Jour 481 (FC), *Bhola Prasad* v. *Emperor.* (Enactments of Legislature ought not to be subjected to the minute scrutiny which may be appropriate to an examination of the bye-laws of a body exercising only delegated powers, nor is the generality of its power to legislate on a particular subject to be cut down by the arbitrary introduction of far-fetched and impertinent limitations.)

1956 Bom 1 (8, 9) (Prs 15, 17) [(S) AIR V 43 C 1]: ILR (1955) Bom 630 (DB), *State of Bombay* v. *Chamarbaugwalia.* (In construing an Act of the Legislature, there is this important principle which must constantly be kept in mind. Not only must the Court be extremely reluctant to invalidate an Act, but the Court must always presume that a Legislature knows what its legislative competence is and what are the limitations upon its competence. It is only if there are clear unequivocal words in the statute which go to show that the Legislature has overstepped its competence or has travelled outside the limitations laid down in the Constitution that the Court will pronounce a legislation to be *ultra vires*: *AIR 1952 Bom 16, Rel. on.*

The Courts must, therefore, interpret and construe the prize competitions included in the first category of the definition in S. 2 (1) (d) of the Bombay Act LIV of 1948, as only those competitions, the success in which does not depend to a substantial degree upon the exercise of skill. In other words, the Courts must presume that the Legislature was legislating under the topic "gambling" and not under the topic "trade and commerce" and as such S. 2 (1) (d) is valid.

Vitally different considerations arise when the question is merely of construction of an Act independently of its constitutionality and when the question is of the construction of an Act which involves its constitutionality.)

1953 Orissa 185 (211) (Pr 60) [A I R V 40 C 61] : I L R (1953) Cut 71 (DB), *Narayana Deo* v. *State of Orissa.* (Onus of establishing that impugned Act is colourable legislation is on party impugning.)

1953 Pat 65 (70) (Pr 8) [AIR V 40 C 21] (DB), *Durgaji* v. *State of Bihar.* (Burden is upon him who attacks the Act to show that there has been a clear transgression of the constitutional principles.)

1952 Bom 16 (18) (Pr 2) [AIR V 39 C 2] (DB), *State of Bombay* v. *Heman Santlal.* (The Court must always lean in favour of the validity of an Act rather than against it. There may be cases in which a law is alleged to contravene fundamental rights. In such cases, undoubtedly the Court must zealously

In construing a statute, as far as possible, that construction must be adopted which will make the statute *intra vires*.[17] The consti-

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scrutinize the provisions of the impugned Act in order to see that the fundamental rights are not violated. But where what is challenged is only the letter of the law and the substance is in the interest of a large body of citizens, then as far as possible the Court must try to uphold the substance and not permit the letter to defeat the object of the Legislature.)

1952 Nag 378 (381) (Prs 13, 14) [AIR V 39] : ILR (1953) Nag 332 (DB), *Shriram* v. *Board of Revenue*. (There is a presumption in favour of the validity of statutes and in the case of limited Legislatures there is a further presumption that the Legislature intends to keep within the four corners of its powers : *AIR 1939 F C 1, Rel. on.*

Apart from the presumption of validity, the Courts should be reluctant to pronounce too readily that an enactment is invalid : 38 C L R 153, *The Federal Commissioner of Taxation* v. *Munro, Ref.*)

(1938) 82 Law Ed 1234 (1241) : 304 U S 144 (152), *United States* v. *Carolene Products Co.*

(1923) 67 Law Ed 785 (791) : 261 U S 525 (544), *Adkins* v. *Children's Hospital.*

(1919) 63 Law Ed 527 (531) : 249 U S 152 (157), *Middleton* v. *Texas Power & Light Company.*

(1904) 48 Law Ed 525 (534) : 192 U S 470 (492), *Buttfield* v. *Stranahan.*

(1901) 45 Law Ed 862 (864) : 181 U S 283 (285), *Fairbank* v. *United States.* (*Brewer J.* — The constitutionality of an Act of Congress is a matter always requiring the most careful consideration. The presumptions are in favour of constitutionality, and before a Court is justified in holding that the legislative power has been exercised beyond the limits granted, or in conflict with restrictions imposed by fundamental law, the excess or conflict should be clear. And yet, when clear, if written constitutions are to be regarded as of value, the duty of the Court is plain to uphold the Constitution, although in so doing the legislative enactment falls. *Marshall C. J. in Marbury* v. *Madison, 2 Law Ed 60 (73) quoted and foll.*)

(1879) 5 App Cas 115 (118) : 49 L J P C 37, *Valin* v. *Langlois.*

(1879) 25 Law Ed 496 (501) : 99 U S 700, *Union Pacific Railroad Co.* v. *United States.*

(1827) 6 Law Ed 606 (625) : 12 Wheat 213 (270), *Ogden* v. *Saunders.*

(1810) 3 Law Ed 162 (175) : 6 Cranch 87, *Fletcher* v. *Peck.*

[*See* (1945) 89 Law Ed 430 (440): 323 U S 516 (529), *Thomas* v. *Collins.* ("The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment.")]

17. 1944 F C 1 (5) [A I R V 31] : 45 Cri L Jour 413 (F C), *Piare Dusadh* v. *Emperor.*

1950 Orissa 157 (167) (Pr 27) [AIR V 37 C 26] : I L R (1950) Cut 222 : 51 Cri L Jour 1189 (FB), *Prahalad Jena* v. *State.*

1952 Pat 359 (363) (Pr 10) [AIR V 39] : ILR 31 Pat 493 (SB), *Atma Ram* v. *State of Bihar.*

1951 Mad 70 (82) [AIR V 38 C 10] (SB), *Srinivasa* v. *State of Madras.*

1954 Cal 248 (252) (Pr 20) [A I R V 41 C 92] (DB), *Golam Bari* v. *State of West Bengal.*

1954 Hyd 50 (52) (Pr 7) [AIR V 41 C 20] : ILR (1954) Hyd 76 (DB), *Firm Soma Rajaiah* v. *S. T. Officer.*

tutionality of an Act cannot be decided on the assumption that the powers conferred by it will be abused.[18]

Where part of the legislation is *ultra vires*, the whole does not become *ultra vires* where the invalid part is severable from the rest,[19]

1954 Pat 266 (Pr 13) [AIR V 41 C 93] : ILR 32 Pat 1148 (DB), *Baijaynanda* **v.** *State of Bihar.*

1954 Pat 262 (Pr 8) [AIR V 41 C 92] : ILR 33 Pat 22 (DB), *Bhabapritananda* v. *President, B. S. B. of R. T.* (*(1891) 1891 App Cas 455, Macleod* v. *Attorney-General For New South Wales, Rel. on.*)

1954 Pat 254 (260) (Pr 13) [AIR V 41 C 91] : ILR 32 Pat 1104 : 1954 Cri L Jour 758 (DB), *Debi Soren* v. *The State.* (AIR 1952 S C 196, *Foll.*)

1953 Pat 105 (107) (Pr 6) [AIR V 40 C 32] : ILR 32 Pat 71 (DB), *Janakinath* v. *State of Bihar.*

1952 Bom 16 (26) (Pr 21) [AIR V 39 C 2] (DB), *State of Bombay* v. *Heman Santlal.*

1952 Pat 166 (169) (Prs 14, 15) [AIR V 39 C 55 (12)] : ILR 30 Pat 1085 (DB), *Bankey Singh* v. *Jhingan Singh.*

(1940) 84 Law Ed 1263 (1270) : 310 U S 381 (392), *Sunshine Anthracite Coal Co.* v. *Adkins.*

(1914) 58 Law Ed 612 (615) : 232 U S 299 (303), *United States* v. *Bennett.*

(1909) 53 Law Ed 836 (849) : 213 U S 366 (407), *United States* v. *Delaware & H. Co.*

(1884) 28 Law Ed 704 (707) : 112 U S 261 (268, 269), *Grenada County Supervisors* v. *Brown.*

[18] 1939 P C 53 (59) [AIR V 26] (PC), *Attorney-General for Alberta* v. *Attorney General for Canada.*

1952 Pat 359 (369) (Pr 22) [AIR V 39] : ILR 31 Pat 493 (SB), *Atma Ram* v. *State of Bihar.*

1954 Pat 266 (271) (Pr 8) [AIR V 41 C 93]: ILR 32 Pat 1148 (DB), *Baijaynanda* v. *State of Bihar.*

(1937) 1 All E R 249 (254) : 106 L J P C 17, *Forbes* v. *Att. Gen. of Manitoba.*

(1912) 1912 App Cas 571 (584) : 81 L J P C 210, *Attorney-General for Ontario* v. *Att. Gen. for Canada.*

(1898) 1898 App Cas 700 (713): 67 L J P C 90, *Attorney-General for the Dominion of Canada* v. *Attorneys General for the Provinces of Ontario Quebec and Nova Scotia.*

(1887) 12 App Cas 575 (586) : 56 L J P C 87, *Bank of Toronto* v. *Lambe.*

(1827) 6 Law Ed 537 (541) : 12 Wheat 19, *Martin* v. *Mott.*

[19] 1952 S C 252 (277, 296) (Prs 62, 137) [AIR V 39] : 1952 S C R 889, 1020 and 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*

1951 S C 318 (331) [AIR V 38 C 55] : 1951 S C R 682 (727-728) : 52 Cri L Jour 1361 (SC), *State of Bombay* v. *F. N. Balsara.*

1949 P C 190 (194) (Pr 19) [AIR V 36 C 56] (PC), *Att. Gen. of Saskatchewan* v. *Att. Gen. of Canada.*

1946 P C 66 (71) [AIR V 33 C 25] : 73 Ind App 59 : 1946 F C R 1 : ILR (1946) Kar (PC) 74 (PC), *Punjab Province* v. *Daulat Singh.* (Retrospective element in Act declared *ultra vires* easily severable by deletion of words giving retrospective effect—The rest of the Act may be left to operate validly.)

1941 F C 47 (59, 66) [AIR V 28] (FC), *Subramanyan* v. *Muthuswami.*

1939 F C 74 (83) [AIR V 26] (FC), *Shyamakant* v. *Rambhajan.*

1951 Nag 58 (85) (Pr 178) [AIR V 38 C 20] : ILR (1951) Nag 646 : 52 Cri L Jour 1140 (FB), *Sheoshankar* v. *M. P. State Government.*

otherwise the whole Act is *ultra vires.*[20] In deciding whether a provision in a statute can be split up into different parts and one part declared invalid and unconstitutional leaving the other to stand, the proper test is to see whether after omitting the offending provisions, the remaining provisions can stand on their own.[21] Where an Act is expressed in general terms so as to include a matter which is not within the purview of the Legislature's powers, it may be held that the Act was not applicable to such matter and that the validity of the Act is not affected.[22] Where, however, the result of omitting

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1950 Orissa 157 (166) [AIR V 37 C 26] : ILR (1950) Cut 222 : 51 Cri L Jour 1189 (FB), *Prahalad Jena* v. *State.*

1955 All 193 (202) (Pr 10) [(S) AIR V 42 C 68], *Ram Manohar Lohia* v. *Supdt., Central Prison.*

1955 Pepsu 129 (133) (Pr 24) [(S) AIR V 42 C 29] (DB), *Sakui Chand* v. *Central Co-operative Bank.*

1955 NUC (Punj) 1887 [AIR V 42], *Associated Traders & Engineers* v. *State of Punjab.*

1954 Trav-Co 257 (258, 259) (Pr 8) [AIR V 41 C 97] : ILR (1954) Trav-Co 139 : 1954 Cri J Jour 669 (DB), *State* v. *Philipose Philip.*

1953 Nag 58 (68) (Pr 60) [AIR V 40 C 25] : ILR (1952) Nag 770 : 1953 Cri L Jour 481 (DB), *Hiralal* v. *State.*

1952 Bom 261 (Pr 6) [AIR V 39] : ILR (1953) Bom 446 (DB), *J. N. Duggan* v. *I.-T. Commr., Bombay City.*

1950 Bom 221 (224) (Pr 6) [AIR V 37 C 60]: ILR (1950) Bom 290 : 51 Cri L Jour 1207 (DB), *Kishori Shetty* v. *Emperor.*

1950 Pat 35 (40) (Pr 25) [AIR V 37 C 14] : ILR 28 Pat 782 : 51 Cri L Jour 300 (DB), *Bhutnath* v. *Province of Bihar.*

(1947) 116 L J R 1392 (1399) : 63 T L R 479, *Att.-Gen. of Alberta* v. *Att.-Gen. of Canada.*

1942 Pat 351 (355) [A I R V 29] : 43 Cri L Jour 220 (DB), *Emperor* v. *Bhola Prasad.*

[20] 1955 Pat 1 (34) (Pr 27) [(S) AIR V 42 C 1]: ILR 33 Pat 690 (SB), *Brij Bhukan* v. *S. D. O., Siwan.*

[21] 1954 Mad 563 (566, 567) (Prs 10, 11, 12) [AIR V 41 C 211] : ILR (1954) Mad 908 (DB), *A. R. V. Achar* v. *Madras State.* (The provision in S. 5, Madras City Municipal Act, reserving seats for Muslims, Indian Christians, and Anglo-Indians may well be omitted without affecting the constitution of the council. It follows that in spite of the declaration that the said provision is illegal and unconstitutional the remaining part of the enactment stands separate.)

[*See* 1951 Hyd 11 (35) (Pr 114) [AIR V 38 C 2] : ILR (1951) Hyd 1 : 52 Cri L Jour 1333 (FB), *Abdur Rahim* v. *J. A. Pinto.* (The correct test of severability is to ascertain whether after the invalid portions of a statute are deleted a different law is created. If a different law is created and the remaining portion operates in a radically different way the Court would decide against its continuance.)]

[22] 1945 F C 25 (31) [AIR V 32] : 1945 F C R 1 : ILR (1945) Kar (FC) 39 (FC), *Umayal Achi* v. *Lakshmi Achi.*

1941 F C 72 (75) [AIR V 28] (FC), *In re Hindu Women's Right to Property Act, 1937.*

1941 F C 47 (66) [AIR V 28] (FC), *Subrahmanyan* v. *Muthuswami.* (As there is no provision in the Madras Agriculturists' Relief Act (Act 4 of 1938), *dealin* any part of the Act would be to reduce the Act to nothing or to something of a kind different from the original, the whole Act must be held to be *ultra vires.*[23] Where the whole Act expresses one single scheme and is not separable into parts, if some of the provisions are *ultra vires*, the whole is *ultra vires.*[24]

The principle of severability mentioned above may be extended to separability in enforcement. Thus, where an Act is expressed in general terms without excluding matters to which, under the Constitution, it cannot apply, and the matters are divisible in their nature, the Court need not declare the whole Act *ultra vires* but may declare that the application of the Act to certain items would be unconstitutional, and may, by an injunction, prohibit the enforcement of the Act in regard to those items.[25]

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in terms with negotiable instruments, any objection based on the wide scope of the Act (Madras Agriculturists' Relief Act 4 of 1938) may be obviated by so interpreting the general terms used in the Act as to limit them to cases with which alone the legislature was competent to deal: see *(1891) 1891 App Cas 455 at p. 459, Macleod* v. *Att. Gen. for New South Wales.)*

1946 Nag 81 (84) [AIR V 33 C 20] (DB), *Balmukand Jainarayan* v. *Ambadas Damodhar.* (As the Provincial Legislature cannot enact a measure dealing with promissory notes the word 'debt' should be interpreted to exclude a claim due on a promissory note.)

[*See also* 1953 S C 252 (263) (Pr 30, 31) [AIR V 40 C 62]: 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors Ltd.*]

23. 1941 F C 72 (77) [AIR V 28] (FC), *In re Hindu Women's Rights to Property Act, 1937.* (If the restriction of the general words to purposes within the power of the Legislature would be to leave an Act with nothing or next to nothing in it, or an Act different in kind, and not merely in degree, from an Act in which the general words were given the wider meaning, then the Act as a whole must be held invalid, because in such circumstances it is impossible to assert with any confidence that the Legislature intended the general words which it has used to be construed only in the narrower sense : *(1910) 11 C L R 689, Owners of S. S. Kalibia* v. *Wilson; (1934) 51 C L R 677, Vacuum Oil Company Ltd.* v. *State of Queensland; (1910) 11 C L R 1, R.* v. *Common Wealth Court of Conciliation and Arbitration, and (1925) 35 C L R 422, British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation, Rel. on.)*

24. 1949 P C 190 (194, 195) (Pr 21) [AIR V 36 C 56] (PC), *Att. Gen. of Saskatchewan* v. *Att. Gen. of Canada.*

1939 F C 74 (83) [AIR V 26] (FC), *Shyamakant* v. *Rambhajan.*

1939 F C 1 (4) [AIR V 26] (FC), *In re C. P. Motor Spirit Act.* (Where the charging section in a taxing statute is held invalid the rest of the Act also should be held invalid as it only provides the machinery for giving practical effect to the charging section.)

1950 Orissa 157 (166) (Pr 21) [AIR V 37 C 26] : ILR (1950) Cut 222 : 51 Cri L Jour 1189 (FB), *Prahalad Jena* v. *State.*

1955 All 193 (202) (Pr 10) [(S) AIR V 42 C 68] : 1955 Cri L Jour 623 (DB), *Ram Manohar Lohia* v. *Supdt., Central Prison.*

1954 Trav-Co 257 (258, 259) (Pr 8) [AIR V 41 C 97] : ILR (1954) Trav-Co 139 : 1954 Cri L Jour 669 (DB), *State* v. *Philipose Philip.*

25. 1955 S C 661 (688) (Prs 51, 52) [(S) AIR V 42 C 101] (SC), *Bengal Immunity Co. Ltd.* v. *State of Bihar.* (Bihar Sales Tax Act, 1947, declared unconstitutional

Where a law has been judicially declared to be partially *ultra vires*, the part so declared *ultra vires* must be treated as a nullity. Hence, where a law has been judicially declared *ultra vires* in so far as it affects certain matters, no notice can be taken of that law in regard to such matters, and so far as such matters are concerned, the law must be treated as a *nullity*.[26] Hence, where a person is charged with the offence of having violated such a law, the onus is on the prosecution to prove that the charge does not relate to the *excluded* matters, because it is only in that case that the charge would be covered by that part of the law which is legally enforceable. The onus is *not* on the accused to prove that the charge relates to the excluded matters and is, therefore, not sustainable in law.[27] Thus, in *Behram Khurshid* v. *State of Bombay*,[28] the question arose as to the effect of the decision of the Supreme Court in *State of Bombay* v. *F. N. Balsara*[29] holding that S. 13 (b) of the Bombay Prohibition Act, 1949, was *ultra vires* in so far as it prohibited the consumption or use of medicinal or toilet preparations containing alcohol. The question that arose in *Behram Khurshid* v. *State of Bombay*[30] was whether in a prosecution of a person under the Bombay Prohibition Act, 1949, for consumption of alcoholic liquor against the provisions of the Act, the prosecution was bound to prove that the accused had consumed *not* a medicinal preparation containing alcohol (as regards which the provisions of the Act had been declared *ultra vires*) but alcohol in some other form, as to which the validity of the Act was unaffected. It was held by a majority of the Supreme Court that the burden was on the prosecution to prove that the accused's case came within the *valid* part of the prohibitory provisions of the Act and was not covered by that part of the provisions which had been declared

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in so far as it permitted imposition of sales tax on sales in the course of inter-State trade, and levy of tax on such sales was prohibited.)

1953 S C 252 (Pr 31) [A I R V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors Ltd.* (Not overruled on this point by *A I R 1955 S C 661*.)

1951 S C 318 (329) (Pr 25) [A I R V 38 C 55] : 1951 S C R 682 : 52 Cri L Jour 1361 (S C), *State of Bombay* v. *F. N. Balsara*. (Bombay Prohibition Act, 1949 —Restrictions on right to acquire, hold or dispose of liquids consisting of or containing alcohol—*Held* that the entire provision was not void but only so far as it applied to liquid, toilet and medicinal preparations containing alcohol —*A I R 1950 S C 124* and *A I R 1951 S C 118, Distinguished*.)

[26] 1955 S C 123 (144) (Pr 49) [(S) A I R V 42 C 24] : 1955 Cri L Jour 215 : 1955 S C R 613 (S C), *Behram Khurshid* v. *Bombay State*.

[27] 1955 S C 123 (144) (Pr 49) [(S) AIR V 42 C 24] : 1955 Cri L Jour 215 : 1955 S C R 613 (S C), *Behram Khurshid* v. *Bombay State*.

[28] 1955 S C 123 (144) (Pr 49) [A I R V 42 C 24] : 1955 Cri L Jour 215 : 1955 S C R 613 (S C). (S. R. Das J. dissenting.)

[29] 1951 S C 318 [A I R V 38 C 55] : 1951 S C R 682 : 52 Cri L Jour 1361 (S C).

[30] 1955 S C 123 [(S) A I R V 42 C 24] : 1955 Cri L Jour 215 : 1955 S C R 613 (S C).

ultra vires by the Supreme Court in the previous case. Mahajan, C. J., in delivering the judgment of the majority, observed as follows:

> "Our opinion on this question is that the effect of the declaration in *State of Bombay* v. *F. N. Balsara*[31] that cl. (b) of S. 13 of the Bombay Prohibition Act is void under ART. 13, cl. (1) of the Constitution in so far as it affects the consumption or use of liquid medicinal or toilet preparations containing alcohol, is to render part of S. 13 (b) of the Bombay Prohibition Act inoperative, ineffective and ineffectual and thus unenforceable. The part of the section which has been declared void has no legal force so far as citizens are concerned and it cannot be recognized as valid law for determining the rights of citizens.
>
> "In other words, the ambit of the section stands narrowed down so far as its enforceability against citizens is concerned and no notice can be taken of the part of the section struck down in a prosecution for contravention of the provisions of that section with the consequence that in prosecutions against citizens of India under S. 13 (b), the offence of contravention of the section can only be proved if it is established that they have used or consumed liquor or an intoxicant which is prohibited by that part of the section which has been declared valid and enforceable and without reference to its unenforceable part. No notice at all should be taken of that other part as it has no relevance in such an enquiry, having no legal effect. In a criminal case unless the prosecution proves a contravention of a provision that is legally enforceable and valid, it cannot succeed. No onus is cast on the accused to prove that his case falls under that part of the section which has been held unenforceable.........
>
> "For determining the rights and obligations of citizens the part declared void should be notionally taken to be obliterated from the section for all intents and purposes, though it may remain written on the statute book and be a good law when a question arises for determination of rights and obligations incurred prior to 26th January 1950 and also for the determination of rights of persons who have not been given Fundamental Rights by the Constitution. Thus, in this situation, there is no scope for introducing terms like 'relatively void' coined by American Judges in construing a Constitution which is not drawn up in similar language and the implications of which are not quite familiar in this country.......
>
> "Article 141 of the Constitution declares that the law declared by the Supreme Court shall be binding on all Courts within the

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[31] 1951 S C 318 [A I R V 38 C 55]: 1951 S C R 682: 52 Cri L Jour 1361 (S C).

territory of India. In view of this clear enactment there is no scope in India for the application of the American doctrine enunciated by Willoughby in THE CONSTITUTION OF THE UNITED STATES, Vol. 1, p. 10, wherein the learned author states, 'the declaration by a Court of unconstitutionality of a statute which is in conflict with the Constitution affects the parties only and there is no judgment against the statute; that the opinion or reasons of Court may operate as a precedent for the determination of other similar cases, but it does not strike the statute from the statute book; the parties to that suit are concluded by the judgment but no one else is bound; a new litigant may bring a new suit based on the very same statute, and the former decision cannot be pleaded as an estoppel, but can be relied on only as a precedent'. Once a statute is declared void under ART. 13, cl. (1) or (2) by this Court, that declaration has the force of law, and the statute so declared void is no longer law *qua* persons whose Fundamental Rights are thus infringed. In America there is no similar statutory provision and that being so, the doctrine enunciated by the learned author can have no application here. In this country once a law has been struck down as unconstitutional law by a Court, no notice can be taken of that law by any Court, and in every case an accused person need not start proving that the law is unconstitutional. The Court is not empowered to look at that part of the law which has been declared as void, and therefore there is no onus resting on the accused person to prove that the law that has already been declared unconstitutional is unconstitutional in that particular case as well. The Court has to take notice only of what the law of the land is, and convict the accused only if he contravenes the law of the land."

A declaration of unconstitutionality brought about by lack of legislative power does not stand on a different footing from a declaration of unconstitutionality brought about by reason of abridgement of Fundamental Rights. It is not a correct proposition that constitutional provisions in PART III of the Constitution merely operate as a *check* on the exercise of legislative power. It is axiomatic that when the law-making power of a State is restricted by a written fundamental law, then any law enacted and opposed to the fundamental law is in excess of the legislative authority and is thus a nullity.[32]

As to the power of the Legislature to pass a *validating* law with reference to a law which has been judicially declared invalid, see NOTE 6.

The Court is not to express an opinion as to the constitutionality of an Act or of any provision therein, which is not necessary

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[32] 1955 S C 123 (145) (Pr 51) [(S) A I R V 42 C 24] : 1955 Cri L Jour 215 : 1955 S C R 613 (S C), *Behram Khurshid* v. *Bombay State*.

Power of, to legislate with respect to any matter in the State List if a Proclamation of Emergency is in operation—See Art. 250.

Power of, to legislate for two or more States by consent—See Art. 252.

Power of, to legislate for giving effect to international agreements — See Art. 253.

Residuary powers of legislation—See Art. 248.

Power to make laws while a Proclamation of Emergency is in operation with respect to matter, notwithstanding that it is one which is not enumerated in the Union List—See Art. 353.

Temporary power of—Parliament to make laws during a period of five years from the commencement of this Constitution with respect to certain matters in the State List as if they were matters in the Concurrent List—See Art. 369.

State Legislature —

Law by, relating to taxes on professions, trades, callings and employments not to be invalid notwithstanding anything in Art. 246—See Art. 276.

Law made by, not to be effective unless reserved for the consideration of and assented by the President—Instances of—See under Art. 200.

Law made by—Rules under—Previous consent of the President when necessary—See Art. 288 (2).

Law made by—Bill or amendment for the purposes of cl. (b) of Art. 304—Necessity of previous sanction of the President—See Art. 304, Proviso.

Proclamation of Emergency in operation—Nothing in Art. 19 to restrict the power of the State as defined in Part III to make any law—See Art. 358.

Synopsis

1. Analogous law.
   - (a) Government of India Act, 1935.
   - (b) Canada.
   - (c) Australia.
   - (d) United States of America.
2. Value of decisions about foreign federations.
3. Retrospective effect. See Art. 245, Note 2.
3a. Limitations on legislative powers.
4. Distribution of legislative power between Union and State Legislatures.
5. "Exclusive power."
6. Predominance of Parliament.
7. Interpretation of legislative entries—General principles.
8. Interpretation of legislative entries—Conflict of jurisdictions.
   - (a) Conflict of jurisdictions between Centre and Units inevitable in any federation.
   - (b) Value of decisions relating to other federations.
   - (c) Overlapping of legislative entries.
   - (d) Each case depending on its own facts.
   - (e) Reconciliation of conflicting entries.
   - (f) Consequential effects of legislation not material for vires.
9. Doctrine of pith and substance.
   - (a) Applicability of the pith and substance rule to entries in same List.
10. Doctrine of occupied field.
11. Colourable legislation.
   - (a) "Colourable legislation" — Meaning.
   - (b) In considering constitutionality of statute, Court to have regard to its real nature.
   - (c) Mere indirectness is immaterial if Legislature otherwise is competent.
   - (d) Motive of Legislature immaterial except indirectly.
   - (e) Burden of proof and matters to be considered.

- (f) Rule of pith and substance distinguished.
12. Legislative practice.
13. Doctrine of immunity of instrumentalities.
14. "With respect to."
15. Scope and extent of legislative powers.
  - (a) Legislative entries denote fields of legislation and not powers of legislation.
16. Doctrine of implied powers.
  - (a) The American doctrine of implied powers.
  - (b) Principle of incidental powers under Indian Constitution : Comparison with American doctrine.
  - (c) Points of difference between American and Indian principles.
  - (d) Wide sweep of the doctrine in America.
  - (e) American doctrine covers independent laws and not merely incidental provisions.
  - (f) American doctrine applies only to Congress and not to those of State Legislatures.
  - (g) Distinction between powers of legislation and topics of legislation—The American approach and the Indian approach.
  - (h) Illustration of above.
  - (i) Characteristic feature of the Indian approach.
  - (j) Principle of incidental powers under Canadian and Australian Constitutions.
  - (k) The Canadian Constitution.
  - (l) The Australian Constitution.
  - (m) Under Canadian and Australian Constitutions, doctrine of incidental powers resorted to for enlarging the legislative powers only where in pith and substance the law falls within the legislative field of the Legislature.
  - (n) Same principles apply in India as under Canadian and Australian Constitutions.
  - (o) Recapitulation.
17. Doctrine of incidental powers—See Note 16. See also Notes 9, 14 and 15.
18. Doctrine of implied prohibitions—See Note 13.
19. Taxing clauses.
20. Concurrent List.
21. Laws for territories not included in Part A or Part B States.
22. Residuary power.
23. Territorial limits of legislative power—See Art. 245 Note 15.

1. Analogous law.

(a) Government of India Act, 1935.

(a) Government of India Act, 1935.

Prior to the Government of India Act, 1935, India had a unitary system of Government. But under Devolution Rules made under S. 45A of the Government of India Act, 1915, as amended by the Act of 1919, subjects were classified as Central and Provincial and Provincial Legislatures were given power to legislate on Provincial subjects without affecting the overriding power of the Central Legislature to legislate on all subjects for all the Provinces. Under this system, the distribution of legislative powers between the Centre and the Provinces was only a matter of administrative convenience and not of legislative competence.[1]

Article 246 — Note 1

[1] 1945 F C 25 (43) [AIR V 32] : 1945 F C R 1 : I L R (1945) Kar (FC) 39 (FC), *Umayal Achi* v. *Lakshmi Achi*. (Under the Government of India Act of 1919

The Government of India Act, 1935, introduced Provincial autonomy and the federal type of Government, which necessarily meant a distribution of legislative powers involving the question of competency of the respective Legislatures. In the Government of India Act, 1935, also, as in the present Constitution, there were three legislative lists, the Federal, Provincial and Concurrent Lists respectively. The enactment as to the distribution of powers between the Central and Provincial Legislatures was contained in S. 100 of the Act which corresponded to this article and ran as follows :

> "**100.** (1) Notwithstanding anything in the two next succeeding sub-sections, the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to this Act (hereinafter called the 'Federal Legislative List').
>
> *Subject matter of Federal and Provincial laws.*
>
> (2) Notwithstanding anything in the next succeeding sub-section, the Federal Legislature, and, subject to the preceding sub-section, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the 'Concurrent Legislative List').
>
> (3) Subject to the two preceding sub-sections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the 'Provincial Legislative List').
>
> (4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof."

It will be noticed that, as under the present article, so under S. 100 of the Government of India Act, 1935, also, the preferential power of legislation in case of overlapping of the legislative lists in respect to any matter was vested in the Central Legislature and that in case of overlapping between the Concurrent and the Provincial Lists, the matter was treated as falling under the Concurrent List and not within the exclusive power of the Province.

Under the present Constitution the residuary powers of legislation are vested in the Centre exclusively. (ART. 248.) But under S. 104 of the Government of India Act, 1935, the power was given to the Governor-General acting in his discretion to empower by public notification either the Federal Legislature or a Provincial Legislature

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the Indian Legislature had plenary powers of legislation over the whole field; provisional powers of legislation being a matter of grace, provision for which was made by Devolution Rules promulgated under S. 45A of that Act.)

to enact laws with respect to matters not covered by any of the legislative lists.

(b) Canada.

(b) Canada.

Under the Canadian Constitution (British North America Act, 1867 (30 & 31 Vict., Ch. 3)) also there are two lists enumerating the exclusive powers of the Centre and Provinces respectively. These two lists are contained in Ss. 91 and 92. Powers which were not expressly conferred on the Provinces were reserved to the Centre[2]—a feature which is analogous to the reservation of residuary powers to the Centre under this Constitution. Agriculture and emigration were, however, placed within the concurrent jurisdiction of both the Centre and the Provinces with a proviso that in case of repugnancy or inconsistency between a Central and a Provincial law, the former should prevail. (S. 95)

Sections 91 and 92 of the British North America Act are reproduced below for convenience of reference :

POWERS OF THE PARLIAMENT.

"**91.** It shall be lawful for the Queen, by and with the advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated, that is to say,

1. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and *Sable Island.*
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.

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[2] 1943 P C 76 (80) [AIR V 30] (PC), *Attorney-General of Alberta* v. *Attorney-General of Canada.*

13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

"And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

EXCLUSIVE POWERS OF PROVINCIAL LEGISLATURES.

"92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes:
    (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
    (b) Lines of Steam Ships between the Province and any British or Foreign Country:
    (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the General Advantage of Canada or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. Generally all Matters of a merely local or private Nature in the Province."

(c) Australia.

(c) Australia.

Under the Commonwealth of Australia Constitution Act of 1900 (63 & 64 Vict., Ch. 12), the scheme of distribution of legislative powers is that the States enjoy the dominant position. There is an enumeration of subjects under S. 51 in regard to which the Centre has *concurrent* legislative power with the States. Under S. 109 of the Act, in case of inconsistency between a Central and a State law, the Central law is to prevail. (Compare ART. 254 of this Constitution.)

There are a few powers which are reserved to the Centre exclusively under S. 52.

With regard to the powers and subjects not mentioned in Ss. 51 and 52, the authority belongs exclusively to the States. Thus, under the Australian Constitution the Central Government is a Government of enumerated powers and the residuary authority vests in the States, unlike under this Constitution and the Canadian Constitution. In this respect the Australian Constitution is similar to the Constitution of the United States.[3]

Sections 51 and 52 of the Commonwealth of Australia Constitution Act, 1900, are reproduced below for convenience of reference:—

"POWERS OF THE PARLIAMENT.

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to :

(i) Trade and commerce with other countries, and among the States ;

(ii) Taxation, but so as not to discriminate between States or parts of States ;

(iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth ;

(iv) Borrowing money on the public credit of the Commonwealth ;

(v) Postal, telegraphic, telephonic, and other like services ;

(vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth ;

(vii) Lighthouses, lightships, beacons and buoys ;

(viii) Astronomical and meteorological observations ;

(ix) Quarantine ;

(x) Fisheries in Australian waters beyond territorial limits ;

(xi) Census and statistics ;

(xii) Currency, coinage, and legal tender ;

(xiii) Banking other than State banking ; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money ;

(xiv) Insurance, other than State insurance ; also State insurance extending beyond the limits of the State concerned ;

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[3] (1914) 1914 App Cas 237 (254) : 83 L J P C 154, *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Company Ltd.* (*Lord Haldane* : In fashioning the Constitution of the Commonwealth of Australia the principle established by the United States was adopted in preference to that chosen by Canada.)

(xv) Weights and measures;

(xvi) Bills of exchange and promissory notes;

(xvii) Bankruptcy and insolvency;

(xviii) Copyrights, patents of inventions and designs, and trade marks;

(xix) Naturalisation and aliens;

(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;

(xxi) Marriage;

(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants;

(xxiii) Invalid and old-age pensions;

(xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the Courts of the States;

(xxv) The recognition throughout the Commonwealth of the laws, the public acts and records, and the judicial proceedings of the States;

(xxvi) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws;

(xxvii) Immigration and emigration;

(xxviii) The influx of criminals;

(xxix) External affairs;

(xxx) The relations of the Commonwealth with the islands of the Pacific;

(xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

(xxxii) The control of railways with respect to transport for the naval and military purposes of the Commonwealth;

(xxxiii) The acquisition, with the consent of the State, of any railways of the State on terms arranged between the Commonwealth and the State;

(xxxiv) Railway construction and extension in any State with the consent of that State:

(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;

(xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides;

(xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose

Parliaments the matter is referred, or which afterwards adopt the law;

(xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.

(xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal judicature, or in any department or officer of the Commonwealth.

52. The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to —

(i) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes:

(ii) Matters relating to any department of the public service, the control of which is by this Constitution transferred to the Executive Government of the Commonwealth:

(iii) Other matters declared by this Constitution to be within the exclusive power of the Parliament."

(d) United States of America.

(d) United States of America.

The main provisions of the Constitution of the United States, which may be referred to in connection with the question of distribution of legislative powers, are ART. I, Ss. 8, 9 and 10 and the 10th Amendment. Article I, S. 8 enumerates certain powers as exercisable by the Congress, that is, the Central Legislature. Article I, S. 9 enacts certain prohibitions against the Centre and ART. I, S. 10 enacts certain prohibitions against the State. The 10th Amendment provides that the powers not delegated to the United States nor prohibited by it to the States are reserved to the States respectively or to the people. Thus, as under the Australian Constitution, the Central Government in America is one of enumerated powers[4] and the residuary power is vested in the States. It may also be noted that with regard to the powers mentioned in ART. I, S. 8 as exercisable by the Central Legislature, those powers are concurrent with those of the States[5] subject to exceptions, wherein certain powers are denied to the States. (See ART. I, S. 10.)

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[4] (1895) 39 Law Ed 1092 (1100) : 158 U S 564 (578), *Re Debs.* ("While under the dual system which prevails with us the powers of government are distributed between the State and the nation, and while the latter is properly styled a Government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty, and, in the exercise of these enumerated powers, acts directly on the citizen, and not through the agency of the State.")
(1819) 4 Law Ed 579 (601) : 4 Wheat 316, *M'Culloch* v. *The State of Maryland.* (The Government of the U S is one of *enumerated powers.* It has no power other than those granted to it. But the extent of such powers is not finally settled.)

In *United States* v. *Cruikshank*,[6] Chief Justice Waite of the Supreme Court of America observed as follows :

> "The Government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the Constitution or laws of the United States, except such as the Government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States."

Woodrow Wilson in his CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES[7] observes :

> "The States of course possess every power that government has ever anywhere exercised, except only those powers which their own constitutions or the Constitution of the United States explicitly or by plain inference withhold. They are the ordinary governments of the country; the federal government is its instrument only for particular purposes."

As regards the general nature of the distribution of powers between the Centre and the States, the following observations of Chief Justice Marshall of the Supreme Court of America in *Gibbons* v. *Ogden*[8] may be quoted :

> "The enumeration presupposes something not enumerated ; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally ; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government."

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[5] (1819) 4 Law Ed 579 (601) : 4 Wheat 316, *M'Culloch* v. *The State of Maryland*. (Law made by U S in pursuance of the Constitution is *supreme* law of land and prevails over State law and State Constitution in case of conflict.)

[6] (1876) 23 Law Ed 588 (591) : 92 U S 542.

[7] Constitutional Government in the United States, 1908, pp. 183, 184. Quoted by Douglas J. in his dissenting judgment in *New York* v. *United States*, (1946) 90 Law Ed 326 (339) : 326 U S 572 (592).

[8] (1824) 6 Law Ed 23 (70) : 9 Wheat 1 (195).

The following passage from Willis' CONSTITUTIONAL LAW OF THE UNITED STATES[9] may be quoted in connection with the distribution of powers between the Centre and the States :

> "*Exclusive and Concurrent powers* : — The powers of the Federal Government may also be classified as exclusive and concurrent powers. The Federal Government has exclusive jurisdiction (1) where the power is lodged exclusively in the Federal Government (e. g., to borrow money on its credit and where it is given jurisdiction over places purchased from the state for forts, etc.), (2) where the power is given to the United States and prohibited to the States (e. g., to tax imports, to make treaties, to make legal tender, to coin money, and to emit bills of credit), and (3) where the power must necessarily be exercised by the Federal Government exclusively and there would be incompatibility in its exercise by the States (e. g., naturalization, and regulation of inter-state commerce national in scope).
>
> "In all other cases, the powers given to the Federal Government are regarded as concurrent. That means that the States may also exercise jurisdiction over them so long as the Federal Government takes no action or so long as the States' action is not in conflict with that of the Federal Government. This is called concurrent jurisdiction, but it should be noted that since the state power must always yield to the federal power, it is not strictly accurate to call the jurisdiction concurrent."

The interpretation of State laws and State Constitutions by State Courts in the United States is binding on the Supreme Court of America.[10]

2. Value of decisions about foreign federations. — While it is open to the Courts to refer to decisions bearing on other federal constitutions like those of Canada and Australia when a question of interpretation of competing legislative powers arises, great caution has to be observed to avoid being misled by precedents bearing on constitutions which may have some peculiar feature of their own which may have influenced the decisions. In this connection, the following observations of Gwyer, C. J., in *In re C. P. Motor Spirit Act*[1] may be quoted :

> "Disputes with regard to central and provincial legislative spheres are inevitable under every federal constitution, and have been the subject-matter of a long series of cases in Canada, Australia and the United States, as well as of numerous decisions

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[9] Willis on Constitutional Law of the United States, 1936, pp 221-222.

[10] (1876) 24 Law Ed 154 (157) : 94 U S 260, *South Ottawa* v. *Perkins*.

Article 246 — Note 2

[1] 1939 F C 1 (5) [AIR V 26] (FC). (The interpretation of British North America Act, 1867, has given rise to analogous questions.)

on appeal by the Judicial Committee. Many of these cases were cited in the course of the argument. The decisions of Canadian and Australian Courts are not binding upon us, and still less those of the United States, but, where they are relevant, they will always be listened to in this Court with attention and respect, as the judgments of eminent men accustomed to expound and illumine the principles of jurisprudence similar to our own; and if this Court is so fortunate as to find itself in agreement with them, it will deem its own opinion to be strengthened and confirmed. But there are few subjects on which the decisions of other Courts require to be treated with greater caution than that of federal and provincial powers, for in the last analysis the decision must depend upon the words of the constitution which the Court is interpreting; and since no two constitutions are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without qualification to another. This may be so even where the words or expressions used are the same in both cases ; for a word or a phrase may take a colour from its context and bear different senses accordingly."

See also the undermentioned cases.[2]

See also NOTE 8.

3. Retrospective effect.—See Art. 245, Note 2.

3a. **Limitations on legislative powers.**—Although the words "subject to the provisions of this Constitution" which occur at the beginning of ART. 245 do not occur in this article, those words govern this article also and the legislative power conferred by it can only be exercised subject to the other provisions of the Constitution.[1] See for instance ART. 35.

See for fuller discussion ART. 245, NOTES 13 and 16.

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[2] 1941 F C 47 (51) [AIR V 28] (FC), *Subrahmanyan* v. *Muthuswami.* (Foreign decisions may be seen for the general principles laid down.)

1941 Mad 913 (916) [AIR V 28] (DB), *Province of Madras* v. *Paidanna.* (In interpreting the Government of India Act the Court can only have regard to the provisions contained therein and cannot refer to the Act of the South Australian Parliament since the Constitution of the Australian Commonwealth has been built on diffrent lines from those of the Indian Constitution. But this does not preclude the Court from examining the judgment of the High Court of Australia while interpreting the Government of India Act.)

Article 246 — Note 3a

[1] **1955 S C 540 (547) [(S) AIR V 42 C 83]: (1955) 2 S C R 164 (SC),** ***Umeg Singh* v. *State of Bombay.*** **(Under Art. 246 State Legislature was invested with power to legislate on topics enumerated in Lists II & III of Seventh Schedule and this power was by virtue of Art. 245 (1) subject to the provisions of the Constitution. The Constitution itself laid down the fetters or limitations on this power, e.g. Art. 303 or Art. 286 (2).)**

4. Distribution of legislative power between Union and State Legislatures. — Article 245 also in a sense deals with the distribution of legislative power between the Union and the States. That article deals with the territorial aspect of the question and states what are the *territorial limits* of the jurisdiction of the Union and State Legislatures as regards their legislative functions. This article deals with the distribution of legislative powers between the Union Legislature and the State Legislatures as regards the *subjects of legislation*. Such a distribution is an essential feature of any federal constitution. As seen in NOTE 1, even under the Government of India Act, 1919, there was a division of legislative subjects into central and provincial under the Devolution Rules made under S. 45A of the Act. But this division was purely a matter of administrative convenience and not of legislative competence. The position changed under the Government of India Act, 1935, with the advent of federation, and the distribution of legislative power between the Centre and the Provinces became a matter of legislative competence involving questions of *ultra vires* and *intra vires*. Under the Government of India Act, 1919, if any doubt arose as to the list under which any particular subject fell, the matter was decided by the Governor-General in Council. But in a federal system, such a question cannot be disposed of by the central Executive but will have to be referred to the *Courts*, for federalism means the triumph of legalism.

As regards the method of distribution of legislative powers, the Constitution follows the method in the Government of India Act, 1935. There are three legislative lists in SCH. VII, enumerating the legislative subjects :-List 1 (Union List), List 2 (State List) and List 3 (Concurrent List).

With regard to the subjects enumerated in List 1 (the Union List), the Parliament has exclusive power of legislation, even where there is overlapping and where a matter is covered by the enumerated subjects in the Union List as well as in either of the two other Lists, the exclusive power of legislation belongs to the Union Parliament (ART. 246 (1)).

With regard to the matters enumerated in State List or List 2 of Sch. VII, the State Legislature will have exclusive jurisdiction provided that the matter is not covered also by the Union List or the Concurrent List. If the matter is covered both by the Union and the State Lists, then, as stated above, the Union has exclusive legislative power. If the matter is covered both by the State List and the Concurrent List, then it must be treated as a concurrent field of legislation and the State will not have exclusive legislative power with regard to it. Thus, the State will have exclusive legislative power only where the matter falls within the State List as an enumerated subject *and* does not fall within the Union List or the Concurrent List.

As regards the matters in the Concurrent List, if a matter falls both in the Concurrent List and the Union List, the Union Parliament will have exclusive power to legislate in respect of it. If a matter falls exclusively in the Concurrent List or both in the Concurrent List and State List, it will constitute a common field for the operation of both the Central and State Legislatures.[1]

The position may also be summed up as follows : Where the matter is exclusively covered by the Union List, the Union Parliament has exclusive legislative power. Where the matter is covered exclusively by the State List, the State Legislature has exclusive legislative power. Where the matter is covered exclusively by the Concurrent List, both the Union and State Legislatures have the power of legislation. In case of overlapping the following positions can be be imagined :

(A) Matter falling within all the three Lists — In such a case the Union Parliament has the exclusive power.

(B) Matter falling in Lists 1 and 2—The Union has exclusive power.

(C) Matter falling in LISTS 1 and 3—The Union has exclusive power.

(D) Matter falling both in LISTS 2 and 3—Both the Union and the States have concurrent power.

Where any matter is not covered by either of the three lists, the legislative power will belong exclusively to the Union Parliament.[2] (ART. 248.)

In case of inconsistency between a Central or State law on a matter on which both the Central and State Legislatures have power to legislate, the Central law will prevail. (See ART. 254.)

Article 246 — Note 4

1. 1949 Mad 481 (489) (Pr 15) [AIR V 36 C 220] : ILR (1949) Mad 739 : 50 Cri L Jour 684 (FB), *In re S. M. Nathaniel.* (AIR 1947 P C 60 (PC), Rel. on.)
1955 Pat 470 (471) (Pr 7) [AIR V 42 C 124] : 1955 Cri L Jour 1616, *Fateh Singh v. State.* (Bihar Waqfs Act (8 of 1948), S. 58, is not *ultra vires* — Bihar Legislature is competent to legislate about trusts and trustees within the State of Bihar: (Sch. VII List III Item 10).)

2. 1954 All 728 (733) (Pr 20) [AIR V 41 C 289] : 1954 Cri L Jour 1485 : ILR (1954) 2 All 191 (DB), *Durgeshwar v. Secretary Bar Council.* (State Legislature has no power to legislate on a matter which is not covered by List II or List III — Adopting a law made by another Legislature is not a matter to be found in Lists II and III. Therefore no law made by a State Legislature can be justified on the ground that though it is not with respect to any of the matters dealt with in Lists II and III it is simply adopting a law validly made by another Legislature.)

Where legislative power with regard to certain subject is vested in the State Legislature, it is not preluded from exercising such power merely because the *proprietary right* in respect of the matter is vested in the Union.[3] In this connection the following observations from the *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia*[4] may be quoted :

> "It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it."

On a matter on which the State Legislature has power of legislation, an Act passed by the State Legislature will prevail over pre-existing laws in force in the State in case of conflict with such laws.[5]

Where a subject falls within the exclusive field of Central Legislature, the State Legislature cannot make a law about it even though there may be no central law dealing with the subject.[6]

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3. 1951 Mad 291 (301) [AIR V 41 C 125]: ILR (1953) Mad 1175 (DB), *A. M. S. S. V. M. & Co.* v. *State of Madras.* (Entry 21 in State List is sufficient to clothe the State Legislature with powers to enact laws in respect of fisheries in territorial waters, notwithstanding that they vested in the Union.)

4. (1898) 1898 App Cas 700 (709) : 67 L J P C 90.

5. *See* 1941 Pat 99 (102) [AIR V 28] (DB), *Sagarmal* v. *Bhuthu Ram.* (Case under Government of India Act, 1935 — The new law will override the old, even though the old may be central legislation.)

1939 Pat 49 (53) [AIR V 26] (DB), *Muhammad Yunus* v. *Champamani Bibi.* (The scheme of the Government of India Act, 1935, is that when a Provincial Legislature makes laws regarding matter in the Provincial Legislative List those laws will prevail notwithstanding that they may be repugnant to a previous all-India Act. The subject "money-lenders and money lending" is on the Provincial Legislative List. *Prima facie* therefore the Bihar Money-lenders Act must prevail within the Province.)

(1882) 7 App Cas 136 (147) : 51 L J P C 26, *Dobie* v. *The Temporalities Board.* (The powers conferred by S. 129 of the British North America Act upon the Provincial Legislatures of Ontario and Quebec to repeal and alter statutes of the old Parliament of the Province of Canada are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of the Act of 1867.)

6. 1943 P C 76 (80) [AIR V 30] (PC), *Att. Gen. Alberta* v. *Att. Gen. Canada.* ((1898) 1898 App Cas 700 *Att. Gen. for the Dominion of Canada* v. *Att Gen. for the Provinces of Ontario, Quebec and Nova Scotia*, Rel. on.)

(1899) 1899 App Cas 626 (628) : 68 L J P C 148, *Hadden* v. *Nelson and Fort Sheppard Rly. Co.*

5. "Exclusive power."—Under cl. (1) of this article, "exclusive power" of legislation is conferred on the Parliament in certain cases, and similarly exclusive power of legislation is conferred on the State Legislatures in certain other cases under cl. (3) of the article. "Exclusive power" is not the same as absolute power.[1] The word "exclusive" in this article has nothing to do with the question of delegation of legislative power by the Legislature and refers only to the distribution of legislative power.[2]

Under ART. 286 (2), Parliament has power to authorise or validate the levy of sales tax by a State on inter-State sales, though sales tax is an exclusively 'State' subject under the Constitution. Such legislation by Parliament would be *intra vires* as the provisions of ART. 246 are, by virtue of the opening words of ART. 245, subject to the provisions of the Constitution.[3]

6. Predominance of Parliament. — As seen in NOTE 4, when a matter falls within the Union List, the Union Parliament has exclusive legislative power with regard to it, notwithstanding that the matter may be covered also by either or both of the other two lists (cl. (1)).[1a] The position was similar under the Government of India Act, 1935, also.[1] Under the Canadian Constitution also, the law is similar and in case of overlapping of powers between the Dominion and the Provincial Legislatures, the authority is to be regarded as exclusively vested in the Dominion Legislature.[2]

(1898) 1898 App Cas 700 (715): 67 L J P C 90, *Attorney-General for the Dominion of Canada* v. *Attorneys General for the Provinces of Ontario, Quebec and Nova-scotia.*

Article 246 — Note 5

[1] 1954 Trav-Co 34 (37, 38) (Prs 4, 6) [AIR V 41 C 12] : 1954 Cri L Jour 63 : ILR (1953) Trav-Co 1073 (DB), *George* v. *State of Travancore-Cochin.* (Power of State Legislature under Art. 246 (3) is subject to Art. 304 (b) Proviso.)

[2] 1951 All 674 (Pr 118) [AIR V 38 C 182] : ILR (1952) 2 All 45 (FB), *Suryapalsingh* v. *U. P. Government.*

[3] 1955 S C 540 (547) [(S) AIR V 42 C 83]: (1955) 2 S C R 164 (SC), *Umeg Singh* v. *State of Bombay.*

Article 246 — Note 6

[1a] 1954 All 728 (730, 731) (Pr 9) [AIR V 41 C 289] : 1954 Cri L Jour 1435 : ILR (1954) 2 All 191 (DB), *Durgeshwar* v. *Secretary Bar Council.* (Matter falling both in List I and List III — Parliament has exclusive power — Matter falling under List III Item 26 as well as List I Item 78—Parliament has exclusive power.)

[1] 1947 P C 60 (65) (Pr 39) [AIR V 34 C 14]: 1947 F C R 28: ILR (1947) Kar (PC) 161 : 74 Ind App 23 (PC), *Prafulla Kumar* v. *Bank of Commerce, Khulna.*
1945 P C 98 (100) [AIR V 32] : 72 Ind App 91 : 1945 F C R 179 : ILR (1945) Kar (PC) 153 (PC), *Governor-General in Council* v. *Madras Province.*
1939 F C 1 (6) [AIR V 26] (FC), *In re C. P. Motor Spirit Act.*
1940 Bom 307 (310, 311) [AIR V 27]: ILR 1940 Bom 777: 42 Cri L Jour 74 (SB), *Emperor* v. *Dantes.*

[2] 1939 P C 53 (56, 57, 58) [A I R V 26] (PC), *Attorney-General of Alberta* v. *Attorny-General of Canada.*

The object of providing for the predominance of the legislative power of the Parliament in case of conflict of the spheres of action allotted to the Parliament and the State Legislatures is to avoid the coming into existence of the inconsistent laws which would be the result if it were held that in case of overlapping both Legislatures have the power of legislation. The Constitution-makers must be supposed to have done their best to avoid an overlapping of powers between the Parliament and the State Legislatures. But at the same time, out of abundant caution they have provided for a solution of the difficulty that may arise in case of overlapping. Referring to the corresponding provision of S. 100 of the Government of India Act, 1935, Gwyer, C. J., observed as follows in *Subrahmanyan* v. *Muttuswami* :[3]

> "Section 100 (3), Constitution Act, provides that a Provincial Legislature has the exclusive power of legislating with respect to the matters enumerated in List 2 of the Provincial Legislative List. But this power is expressly stated to be subject to the provisions of S. 100 (1), which give an exclusive power to the Federal Legislature to legislate with respect to the matters enumerated in List I of the Federal Legislative List. Hence, though Parliament has no doubt done its best to enact two lists of mutually exclusive powers, it has also provided, *ex majori cautela*, that if the two sets of legislative powers should be found to overlap, then the federal legislation is to prevail. And the reason for this is clear. However

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1914 P C 174 (176) [AIR V 1] (PC), *John Deere Plow Co. Ltd.* v. *T. F. Wharton*. (The general power conferred on the Dominion by S. 91 of the British North America Act to make laws for the peace, order and good government of Canada extends in terms only to matters not coming within the classes of subjects assigned by the Act exclusively to the Legislatures of the Provinces. But if the subject-matter falls within any of the heads of S. 92, it becomes necessary to see whether it also falls within any of the enumerated heads of S. 91, for if so, by the concluding words of that section it is excluded from the powers conferred by S. 92.)

[*See* 1943 P C 76 (80) [AIR V 30] (P C), *Att.-Gen. of Alberta* v. *Att-Gen. of Canada*. (Legislation coming in pith and substance within one of the classes specially enumerated in the Central List is beyond the legislative competence of the Provincial Legislatures : *Attorney-Gen. for the Dominion of Canada* v. *Att-Gen. for the Provinces of Ontario, Quebec and Novascotia*, (1898) 1898 App Cas 700 (715), *Rel. on.)*

1941 F C 47 (50) [AIR V 28] (FC), *Subrahmanyan* v. *Muttuswami*. (As interpreted by Privy Council, British North America Act presents an exact analogy — A I R 1921 P C 148, *Rel. on.*)

(1907) 1907 App Cas 65 (68) : 76 L J P C 23, *Grand Trunk Rly. of Canada* v. *Att.-Gen. of Canada*. ("There can be a domain in which Provincial and Dominion legislation may overlap in which case neither legislation will be *ultra vires*, if the field is clear; and if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail.")]

[3] 1941 F C 47 (50) [AIR V 28] (FC).

> carefully and precisely lists of legislative subjects are defined, it is practically impossible to ensure that they never overlap; and an absurd situation would result if two inconsistent laws, each of equal validity, could exist side by side within the same territory."

But the priority of the power of Parliament over that of the State Legislature must be invoked only as a last resort, when it is not possible fairly to reconcile the enumerated powers of the two Legislatures.[4] (See also NOTES 7 and 8.) In this connection, the following passage regarding S. 100 of the Government of India Act, 1935, corresponding to this article, may be quoted from the judgment of the Privy Council in the *Governor-General in Council* v. *Province of Madras* :[5]

> "The third reason thus stated rests on the opening words of S. 100 (1), Constitution Act, 'Notwithstanding anything in the two next succeeding sub-sections' and the opening words of S. 100 (3) 'Subject to the two preceding sub-sections.' Their Lordships do not doubt that the effect of these words is that, if the legislative powers of the Federal and Provincial Legislatures, which are enumerated in LIST 1 and LIST 2 of SCH. VII, cannot fairly be reconciled, the latter must give way to the former. But it appears to them that it is right first to consider whether a fair reconciliation cannot be effected by giving to the language of the Federal Legislative List a meaning which, if less wide than it might in another context bear, is yet one that can properly be given to it, and equally giving to the language of the Provincial Legislative List a meaning which it can properly bear."

The predominance of the legislative power of the Parliament over that of the State Legislature in case of overlapping of powers as enumerated in legislative lists means that in such cases the legislative power vests *exclusively* in the Parliament and not that in case of repugnancy between the State law and the law made by the Parliament the latter should prevail. In other words, the State Legislature has no power at all to legislate in such cases and no question of repugnancy can arise. The incompetency of the State Legislature to legislate in such cases does not depend upon the existence of a law made by the Parliament. This has been seen in NOTE 4.

The predominant legislative power of the Parliament does not entitle it to directly repeal any State law.[6]

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[4] 1945 P C 98 (100) [AIR V 32] : 72 Ind App 91 : 1945 F C R 179 : ILR (1945) Kar (P C) 153 (PC), *Governor-General in Council* v. *Madras Province.*

[5] 1945 P C 98 (100) [AIR V 32] : 72 Ind App 91 : 1945 F C R 179 : ILR (1945) Kar (P C) 153 (P C).

[6] *See* (1896) 1896 App Cas 348 (366) : 65 L J P C 26, *Attorney-General for Ontario* v. *Attorney-General for the Dominion.* (The Dominion Parliament of Canada has no authority conferred upon it by the British North America Act

Within their allotted spheres, the Parliament and the State Legislatures are co-ordinate authorities and the State Legislatures are not in any sense subordinate bodies under the Parliament.[7]

(See also ART. 254, NOTE 12.)

7. Interpretation of legislative entries — General principles. — The general principles as to interpretation of the Constitution, which have been discussed in Preamble, NOTE 5, will apply to the interpretation of legislative entries also. The following rules may be specially noted in connection with the interpretation of entries in the legislative lists :

Entries in legislative lists must *prima facie* be given a broad and comprehensive interpretation,[1] but should not be unduly

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to repeal directly any Provincial statute, whether it does or does not come within the limits of jurisdiction prescribed by S. 92—Accordingly, the Canada Temperance Act, 1886, so far as it purported to repeal the prohibitory clauses of the old Provincial Act of 1864 was *ultra vires* the Dominion.)

[7] (1924) 1924 App Cas 328 (343): 93 L J P C 137, *Attorney-General for Ontario* v. *Reciprocal Insurers.* ("Within the spheres allotted to them by the Act (British North America Act) the Dominion and the Provinces are rendered in general principle co-ordinate Governments." — *Per Lord Haldane* in AIR 1921 P C 148 (P C) *quoted.*")

(1892) 1892 App Cas 437 (441, 442, 443) : 61 L J P C 75, *Maritime Bank of Canada* v. *New Brunswick.* (The Provincial Legislature does not occupy the subordinate position. It derives no authority from the Government of Canada and its status is in no way analogous to that of a municipal institution, which is an authority constituted for purposes of local administration. It possesses powers, not administrative merely, but of legislation, in the strictest sense of that word, and within the limits assigned by S. 92 these powers are exclusive and supreme.)

Article 246 — Note 7

[1] 1955 S C 504 (520) (Pr 30) [(S) AIR V 42 C 82] : (1955) 2 S C R 303 (SC), *Amar Singhji* v. *State of Rajasthan.* (Rajasthan Land Reforms and Resumption of Jagirs Act (6 of 1952)—Although there is no specific entry relating to "resumption" of lands in Sch. VII, List II, Entry 18 would cover the Act; but in pith and substance, the Act deals with 'acquisition' though entitled "Resumption" Act and falls under Entry 36, List II.)

1955 S C 58 (61) (Pr 6) [(S) AIR V 42 C 14] : 1955 S C R 829 (SC), *Navinchandra* v. *Commr. of I.-T., Bombay.* ("The cardinal rule of interpretation is that words should be read in their natural and grammatical meaning subject to this rider that in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude.")

1941 F C 16 (32) [AIR V 28] (FC), *United Provinces* v. *Atiqa Begum.*

1954 Punj 167 (171) (Pr 13) [AIR V 41 C 86] (FB), *Bhagirath* v. *State of Punjab.* (All the provisions of the Punjab Security of Land Tenures Act are concerned with rights in or over land, land tenures, the relation of landlord and tenant and collection of rents and the Act therefore clearly falls under Item 18, List 2, Schedule 7.)

1955 Assam 249 (260) (Pr 23) [(S) AIR V 42 C 59] (SB), *H. P. Barua* v. *State of Assam.*

stretched.[2] (See also NOTES 8, 9, 14 and 15.)

Although the provision for residuary powers indicates that the entries in the three legislative lists are not exhaustive, it must be remembered that the residuary powers must be invoked only as a last resort because the lists are so comprehensive that it would only be extremely rare cases that would not be covered by them at all.[3]

All legislative heads must be *reasonably* construed and a power to legislate as to principles on which compensation for property acquired or requisitioned for public purposes is to be determined (SCH. VII, LIST 3, ENTRY 42) does not include the power to legislate for the non-payment of compensation at all.[4]

In determining whether an Act falls within a certain legislative entry or not, the preamble to the Act is not conclusive.[5]

1955 Pat 1 (15) (Prs. 10, 11) [(S) AIR V 42 C 1] : ILR 33 Pat 690 (SB), *Brij Bhukan* v. *S. D. O. Siwan*. (None of the items in any of the lists is to be read in a narrow and restricted sense — Bihar Land Encroachment Act (31 of 1950) is covered by Sch. VII List II Entries 18 and 65 and is within the competence of the State Legislature.)

[*See* 1953 S C 83 (86) (Pr 11) [AIR V 40 C 23] : 1953 Cri L Jour 525: 1953 S C R 319 : ILR 1953 Punj 639 (SC), *Darshan Singh* v. *State of Punjab*. ("Trade and commerce" in S. 4 of Essential Supplies (Temporary Powers) Act, 1946, includes *export* and order placing restriction on *export* can be passed under the Act — *Held*, East Punjab Cotton Cloth and Yarn (Regulation of Movement) Order, 1947, provisions prohibiting export of cotton cloth and yarn outside India not *ultra vires*.)

(1819) 4 Law Ed 579 (601) : 4 Wheat 316 (407), *M'Culloch* v. *The State of Maryland*. (Chief Justice Marshall : "We must never forget that it is a Constitution we are expounding.")]

2. *See* 1946 Bom 216 (233, 234) [AIR V 33 C 59]: ILR (1946) Bom 517, *Tan Bug Taim* v. *Collector of Bombay*. ('Acquisition of land' does not include requisitioning thereof.)

3. 1941 F C 16 (32) : [AIR V 28] (FC), *United Provinces* v. *Atiqa Begum*. (Government of India Act, 1935, List II, Entries 21 & 2, cover the subject of U. P. Regularization of Remissions Act, 14 of 1938.)

1956 Bom 1 (6) (Pr 9) [(S) AIR V 43 C 1] : ILR (1955) Bom 680 (DB), *State of Bombay* v. *Chamarbaugwalia*.

4. 1952 S C 252 (277) (Pr 60) [AIR V 39] : 1952 S C R 889, 1020 & 1056: 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh*. (List III, Entry 42—"Principles on which compensation for property acquired is to be determined"—Power does not include power to legislate for non-payment —*United Provinces* v. *Atiqua Begam*, AIR 1941 F C 16 (FC), *distinguished* on the ground that the entries in that case are not in *pari materia* to Entry 42—*Attorney-General for Ontario* v. *Attorney-General for the Dominion*, (1896) 1896 App Cas 348, holding that power to regulate does not include power to prohibit, held to be more analogous.) [But see 1952 All 88 (89) (Pr 4) [AIR V 39 C 29] (DB), *Mt. Govindi* v. *State of Uttar Pradesh*. (Not good law after AIR 1952 S C 252 (SC).)]

5. 1950 F C 67 (69) (Pr 8) [AIR V 37 C 6] : 1949 F C R 657 : 51 Cri L Jour 1011 (FC), *Rex* v. *Basudeva*. (Whilst a statement in the preamble of a statute as to its ultimate objective may be useful as throwing light on the nature of the

Strict construction should be placed on those provisions of the Constitution which go to curtail the liberties of the subject or impose burdens and obligations upon him. Therefore, the entries in the lists of SCH. VII should not be so construed as to deprive the subject of his liberties or to impose burdens or obligations upon him beyond those which are warranted by the words used, in spite of the entries in the lists being read as extending to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in the same.[6]

Although general principles of construction of statutes are applicable to the construction of the Constitution, yet, where the context definitely indicates that a constitutional provision was *not* drafted according to a certain general principle, such principle will not apply.[7] Thus, it is a general principle of the construction of statutes that when two words or expressions are coupled together one of which generally includes the other, the more general term is used in a sense excluding the specific one. But in *Manikka Sundara Bhattar* v. *R. S. Nayudu*,[8] it was held by the Federal Court that this principle was not kept in view in drafting of a large number of items in the legislative lists of Government of India Act, 1935. Spens, C. J., observed as follows :

> "It is true that the general principle referred to earlier in this judgment and taken from Maxwell on the Interpretation of Statutes may often properly be applied. But all such general principles of construction must yield to definite indications in the context that the portions of an enactment to be construed have not been drafted on the basis of any such principle. In our opinion it is only necessary to consider in detail a number of entries in the lists in SCH. VII to come to the conclusion that so far from

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matter legislated upon and must undoubtedly be taken into consideration, it cannot be conclusive on a question of *vires*, where the Legislature concerned has powers to legislate on certain specified matters only. The Court must still see in such cases whether the subject-matter of the impugned legislation is really within those powers.)

[6] 1946 Bom 216 (234) [AIR V 33 C 59] : ILR (1946) Bom 517, *Tan Bug Taim* v. *Collector of Bombay*. (Government of India Act, 1935, Sch. VII, List II Entry 9, which deals with *acquisition* of property does not give power to make law for *requisitioning* thereof.)

[7] 1947 F C 1 (4) (Pr 6) [AIR V 34 C 1] : 1946 F C R 67 : ILR (1946) Kar (FC) 27 (FC), *Manikkasundara Bhattar* v. *R. S. Nayudu*.

[8] 1947 F C 1 (Pr 6) [AIR V 34 C 1] : 1946 F C R 67 : I L R (1946) Kar (FC) 27 (FC). (Government of India Act, 1935, List II, Entry 34, "Charities" includes religious institutions like temples — Though religious endowments are mentioned, that does not limit the meaning of "charities' which is wide enough to include religious institutions—Hence Madras Temple Entry Authorisation and Indemnity Act, 1939 is *intra vires* the Madras Legistature—Confirming on appeal A I R 1945 Mad 211.)

> the principle referred to having been kept in view throughout the drafting of these lists, a very different principle has in fact been adopted in a large number of cases. In such last mentioned cases, it seems to us that the entries start with the use of some term or phrase of very general and far-reaching conception, and that then such term or phrase is followed by a number of words or phrases with meanings which might well be included in the meaning of the opening term or phrase, if that had been left to stand alone, or with meanings indicating a somewhat different approach to the subject of legislation intended to be included in the opening term or phrase. Such additional words and phrases are added for the purpose of removing doubts as to the wide scope of the meaning of the opening term or phrase. The subsequent words and phrases are not intended to limit the ambit of the opening general term or phrase but rather to illustrate the scope and objects of the legislation envisaged as comprised in the opening term or phrase. In List 1, Entries Nos. 3, 7, 20 and 33; in List 2, Entries Nos. 4, 13, 18, 19, 20, 21 and 27; in List 3, Entries Nos. 10, 18 and 27, may all be referred to as instances of entries where the meaning of the opening general term or phrase is not intended to be cut down by anything that follows, unless expressly so provided, as for instance, by the last words of Entry No. 10 of List 3. In some instances, that this is the proper principle of construction of entries in the lists is made clear by the opening term or phrase being followed by the expression 'that is to say' or the use of the word 'including'. But these additional helps to construction are by no means always used in entries of this description. *Cf.* Entry No. 27 in List 3."

The various entries in Lists 1 to 3 are not *powers* of legislation but *fields* of legislation. Where one entry is made subject to another entry, all that it means is that out of the scope of the former, a field of legislation covered by the latter entry has been reserved to be specially dealt with by the appropriate Legislature. It does not import any limitations on the power of the Legislature acting within the field denoted by the former entry.

Thus, List, 2, Entry 36 runs: "Acquisition or requisitioning of property............subject to the provisions of Entry 42 of List 3." Entry 42 in List 3 reads: "Principles on which compensation for property acquired or requisitioned......is to be determined." The words "subject to the provisions of Entry 42 of List 3" in Entry 36 of List 2 do not mean that the State Legislature cannot make a law under that entry unless it provides for the payment of compensation. The words only mean that the power to lay down the principles according to which compensation must be determined is a concurrent power and not a power of the State Legislature.[9]

Definitions given by eminent text book writers like Mill may be considered in interpreting the provisions of the Constitution, as such definitions embody the common understanding of persons knowing the subject and may therefore be presumed to have been present to the minds of the makers of the Constitution.[10]

In *In re C. P. Motor Spirit Act*[11] it was held by the Federal Court that the proposal for the Indian Constitutional Reforms, commonly known as the White Paper, and the Report of the Joint Select Committee thereon were historical facts and their relation to the Government of India Act, 1935, was a matter of common knowledge to which the Federal Court was entitled to refer.

In *V. M. Syed Mohammad and Co.* v. *State of Andhra*[12] it was held by the Supreme Court that in interpreting the entries in the legislative lists in the Government of India Act, 1935, the intention of the Constituent Assembly as expressed in the entries in the legislative lists of the present Constitution cannot be a safe guide inasmuch as the Government of India Act, 1935, was the work of a totally different body, namely, the British Parliament.

The words "that is to say" in the several legislative entries are merely illustrative and not words of limitation.[13]

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9. 1952 S C 252 (Pr 42) [AIR V 39] : 1952 S C R 889, 1020 and 1056 : I L R 31 Pat 565 (S C), *State of Bihar* v. *Kameshwar Singh.* (The condition as to payment of compensation for property compulsorily acquired for public purpose cannot be inferred from legislative entries—See Art. 31, Note 10.)

1952 All 88 (89) (Pr 4) [AIR V 39 C 29] (DB), *Mt. Govindi* v. *State of Uttar Pradesh.*

10. 1939 F C 1 (35) [AIR V 26] (FC), *In re C. P. Motor Spirit Act.* (Meaning of "excise" in Government of India Act, 1935, Sch. VII, List I, Entry 45.)

11. 1939 F C 1 (9) [AIR V 26] (FC). (*Gwyer C. J.* — Taxes on sale of commodities and turnover appeared in the White Paper as a suggestion for possible sources of provincial revenue and the suggestion was approved without comment by the Joint Select Committee.)

12. 1954 S C 314 (315) (Pr 3) [AIR V 41 C 75] : 1954 S C R 1117 (SC). (The argument that List II, Entry 54 of present Constitution indicated that under Government of India Act, List II, Entry 48, there was no power to tax purchase is fallacious.)

[See however 1954 Bom 204 (205) (Pr 4) [AIR V 41 C 53] : ILR (1954) Bom 434 (DB), *A. C. Patel* v. *Vishwanath.* (In construing the various entries in Sch. 7, Government of India Act, 1935, it is permissible to rely on a corresponding entry in the Constitution of India to show what was the intention of the Constitution-makers, because it is well known that the Constitution was based upon the Government of India Act and the Court must look at the Constitutional history in order to construe expressions used in the Government of India Act and in the Constitution.)]

13. 1942 F C 17 (19, 20) [AIR V 29] : 43 Cri L Jour 481 (FC), *Bhola Prasad* v. *Emperor.* (The words "that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs" in Sch. 7, List 2, item 31, Government of India Act, 1935, explain or

(a) Conflict of jurisdictions between Centre and Units inevitable in any federation.

8. Interpretation of legislative entries — Conflict of jurisdictions.—The Constitution of India is unique, like the Government of India Act, 1935, among the federal constitutions of the world, in the length and detail of its legislative lists which have been elaborated with a view to avoid, as far as possible, the assignment of residuary powers, by an exhaustive enumeration of legislative subjects.[1] In spite of this elaboration, however, the necessity for judicial determination, in particular cases, of the limits of the legislative authority of the respective Legislatures continues to exist, (as it existed under the Government of India Act). But this is inevitable in any federal constitution.[2] In *Governor-General in Council* v. *Madras Province*,[3] Lord Simonds, delivering the judgment of the Privy Council, observed as follows :

> "In a federal Constitution, in which there is a division of legislative powers between central and provincial Legislatures, it appears to be inevitable that controversy should arise whether one or other Legislature is not exceeding its own and encroaching on the other's constitutional legislative power."

In *M'Culloch* v. *The State of Maryland*,[4] Chief Justice Marshall of the Supreme Court of America observed as follows :

> "This Government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the

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illustrate and do not amplify or limit the words "intoxicating liquors and narcotic drugs" immediately preceding them and cover the whole field of possible legislation on the subject.)

1941 F C 16 (25) [AIR V 28] (FC), *United Provinces* v. *Atiqa Begum*. (None of the items in the list is to be read in a narrow or restricted sense. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. The power to legislate with respect to the collection of rents (List II, Entry 21) includes the power to legislate with respect to the remission of rents as well as their collection, and the power to legislate with respect to fisheries (List II, Entry 21) would include the prohibition of fishing altogether in particular places or at particular times.)

Article 246 — Note 8

[1] *See* 1945 P C 98 (101) [AIR V 32] : 72 Ind App 91 : 1945 F C R 179 : I L R (1945) Kar (PC) 153 (PC), *Governor General in Council* v. *Madras Province*. (*Lord Simonds* —The Indian Constitution is unlike any that have been called to their Lordships' notice in that it contains what purports to be an exhaustive enumeration and division of legislative powers between the Federal and Provincial Legislatures.)

1939 F C 1 (4) [AIR V 26] (FC), *In re C. P. Motor Spirit Act*. (See the observations of Gwyer C. J. regarding the Govt. of India Act, 1935.)

[2] 1945 P C 98 (99) [AIR V 32] : 72 Ind App 91 : 1945 F C R 179 : I L R (1945) Kar (PC) 153 (PC), *Governor General in Council* v. *Madras Province*.

1939 F C 1 (5) [AIR V 26] (FC), *In re C. P. Motor Spirit Act*.

[3] 1945 P C 98 (99) [AIR V 32] : 72 Ind App 91 : 1945 F C R 179 : I L R (1945) Kar (PC) 153 (PC).

[4] (1819) 4 Law Ed. 579 (601) : 4 Wheat 316.

powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist. In discussing these questions the conflicting powers of the general and State governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled."

(b) Value of decisions relating to other federations.

In determining such disputes, the Courts may refer to decisions bearing on other federations such as those of Canada, Australia and United States, although they must do so with great caution.[5] (See also NOTE 2.)

(c) Overlapping of legislative entries.

The entries in the legislative lists overlap each other in a large number of cases.[6] (See also NOTE 14.)

In *John Deere Plow Co. Ltd.* v. *T. F. Wharton*,[7] Viscount Haldane, in discussing the relation to each other of Ss. 91 and 92 of the British North America Act, 1867 (which dealt with the legislative powers of the Dominion Parliament and Provincial Legislatures in Canada), made the following observations :

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[5] 1941 F C 47 (51) [AIR V 28] (FC), *Subrahmanyan* v. *Muttuswami*.
1939 F C 1 (5) [AIR V 26] (FC), *In re C. P. Motor Spirit Act*.
1939 Mad 361 (365) [AIR V 26] (FB), *Nagaratnam* v. *Sheshayya*.

[6] 1947 P C 44 (47) [AIR V 34 C 10] (PC), *Att. Gen. of Canada* v. *Att. Gen. of Quebec Province*. (The classes of subjects looked at singly overlap in many respects.)

1941 F C 16 (25) [AIR V 28] (FC), *United Provinces* v. *Atiqa Begum*. (The legislative subjects are not set out with scientific definition—Parliament seems to have taken a number of comprehensive categories.)

1939 F C 1 (7) [AIR V 26] (FC), *In re C. P. Motor Spirit Act*. (*Gwyer C. J.*— "It appears then that the language in which the particular legislative powers which the Court is now considering have been granted to the Central and Provincial Legislatures respectively may be wide enough, if taken by itself and without reference to anything else in the Act (Government of India Act, 1935) to cover in each case a tax of the kind which has been imposed, whether it be called an excise duty, if imposed by the Central Legislature, or a tax on the sale of goods, if imposed by a Province.")

[*See* 1939 P C 53 (56) [AIR V 26] (PC), *Att.-Gen. of Alberta* v. *Att.-Gen. of Canada*. ("The 'classes of subjects' enumerated, looked at singly, overlap in many respects"—(Observations regarding Ss. 91 and 92 of the British North America Act, 1867.))

(1883) 9 App Cas 117 (130): 53 L J P C 1, *Hodge* v. *The Queen*. (Subjects which in one aspect and for one purpose fall within Section 92, British North America Act, may, in another aspect, and for another purpose fall within S. 91, British North America Act — This principle is illustrated by *Russell* v. *The Queen*, (1882) 7 App Cas 829 and *Citizens Insurance Co.* v. *Parsons*, (1881) 7 App Cas 96.)]

[7] 1914 P C 174 (176, 177) [AIR V 1] (PC).

> "The language of these sections and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme. The draftsman had to work on the terms of a political agreement, terms which were mainly to be sought for in the resolutions passed at Quebec in October, 1864. To these resolutions and the sections founded on them the remark applies which was made by this Board about the Australian Commonwealth Act in a recent case, *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co. Ltd.*,[8] that if there is at points obscurity in language, this may be taken to be due, not to uncertainty about general principle, but to that difficulty in obtaining ready agreement about phrases which attend the drafting of legislative measures by large assemblages. It may be added that the form in which provisions in terms overlapping each other have been placed side by side shows that those who passed the Confederation Act intended to leave the working out and interpretation of these provisions to practice and to judicial decision."

The above observations are applicable *mutatis mutandis* to the entries in the three legislative lists of SCH. VII.

(d) Each case depending on its own facts.

Thus, whenever a dispute arises as to whether a particular piece of legislation is within the competence of the Legislature which passed it, the Court must determine what in pith and substance constitutes the subject-matter of legislation and see, by comparing the language of the different entries that may possibly cover the case, under which particular entry it can be said most appropriately to fall.[9] In this

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[8] (1914) 1914 App Cas 237 : 83 L J P C 154.

[9] 1954 S C 251 (252) [AIR V 41 C 55] : 1954 S C R 779 (SC), *Rajahmundry E. S. Corporation* v. *State of Andhra.* (Madras Electricity Supply Undertakings (Acquisition) Act (43 of 1949) in pith and substance is not an Act dealing with 'Electricity' covered by Government of India Act, 1935, Sch. VII, List III, Entry 31, but is an Act providing for the compulsory acquisition of a commercial or industrial undertaking for which there is no specific legislative entry and so falls under S. 104, Government of India Act, 1935.)

[*See* 1939 P C 53 (56) [AIR V 26] (PC), *Attorney-General of Alberta* v. *Attorney-General of Canada.* (Observations regarding Ss. 91 and 92 of British North America Act, 1867—It is necessary to compare the two complete lists of categories with a view to ascertaining whether the legislation in question fairly considered falls *prima facie* within S. 91 rather than within S. 92. The next step in a case of difficulty will be to examine the effect of the legislation; *Union Colliery Company of British Columbia* v. *Bryden*, (1899) 1899 App Cas 580, *Rel on.*

For that purpose the Court must take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by the evidence as to what the effect of the task, attempting to define in the abstract the exact scope of different legislative entries will be not only futile but will also be something not contemplated by the makers of the Constitution. To adapt the words of Viscount Haldane in the passage quoted above, the form in which the provisions in terms overlapping each other have been placed side by side shows that those who passed the Constitution intended to leave the working out of those provisions to practice and to judicial decision. In the same case[10] Viscount Haldane observed as follows :

> "The structure of Ss. 91 and 92, and the degree to which the connotation of the expressions used overlaps, render it, in their Lordships' opinion, unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of these expressions. Such definitions, in the case of language used under the conditions in which a constitution such as that under consideration was framed, must almost certainly miscarry. It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be avoided. Their Lordships adhere to what was said by Sir Montague Smith in delivering the judgment of the Judicial Committee in *Citizens Insurance Co. of Canada* v. *Parsons*[11] to the effect that in discharging the difficult duty of arriving at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers which they contain and give effect to them all, it is the wise course to decide each case which arises without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand. The wisdom of adhering to this rule appears to their Lordships to be of especial importance when putting a construction on the scope of the words 'civil rights' in particular cases. An abstract logical definition of their scope is not only, having regard to the context of Ss. 91 and 92 of the Act, impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases. It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them, may in a different aspect and for a different purpose fall within the other. In such cases the nature and scope of the legislative attempt of the Dominion or the Province, as the case may be, have to be examined with reference to the actual facts, if it is to be possible to determine under which set of powers it falls in substance and in reality. This

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legislation will be. Clearly the Acts passed by the Provincial Legislature may be considered.)]

[10] 1914 P C 174(177) [AIR V 1] (PC), *John Deere Plow Co. Ltd.* v. *T. F. Wharton.*

[11] (1881) 7 App Cas 96 (109) : 51 L J P C 11.

may not be difficult to determine in actual and concrete cases. But it may well be impossible to give abstract answers to general questions as to the meaning of the words, or to lay down any interpretation based on their literal scope apart from their context."

Thus, each case must be dealt with on its own facts and circumstances and an abstract definition of the scope of the different legislative entries is not contemplated.[12] While no general test applicable to every case of overlapping of powers may be possible, yet it may be comparatively easy to determine that a particular piece of legislation is an encroachment on forbidden territory.[13]

The following observations of Viscount Haldane in the same case[14] are also worth quoting here:

> "For the reasons already indicated, it is impracticable to attempt with safety definitions marking out logical disjunctions between the various powers conferred by Ss. 91 and 92 and between their various sub-heads *inter se*. Lines of demarcation have to be drawn in construing the application of the sections to actual concrete cases, as to each of them individually the Courts have to determine on which side of a particular line the facts place them. But while in some cases, it has proved, and may hereafter prove, possible to go further and to lay down a principle of general application, it results from what has been said about the language of the Confederation Act, that this cannot be satisfactorily accomplished in the case of general questions such as those referred to."

As observed by Gwyer, C. J., with reference to the Government of India Act, 1935, in *In re C. P. Motor Spirit Act*,[15] "the question before the Court is not how the two legislative powers are theoretically capable of being construed, but how they are to be construed here and now in the Constitution Act."

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[12] 1939 P C 53 (56) [AIR V 26] (PC), *Attorney-General of Alberta* v. *Attorney-General of Canada*. (Case from Canada — Whether a Provincial Act, which indirectly interferes in some degree with one of the powers of the Dominion, is or is not *ultra vires* must be determined in each case as it arises, for no general test applicable to all cases can safely be laid down : AIR 1914 P C 174 and AIR 1921 P C 148, *Rel. on.*)

1931 P C 94 (95) [AIR V 18] : 32 Cri L Jour 899 (PC), *Proprietary Articles Trade Association* v. *Attorney-General of Canada*. (Regarding Ss. 91 and 92, British North America Act, 1867.)

1914 P C 174 (179) [AIR V 1] (PC), *John Deere Plow Co. Ltd.* v. *T. F. Wharton.* (Case regarding British North America Act, 1867.)

1939 F C 1 (31) [AIR V 26] (FC), *In re C. P. Motor Spirit Act.*

(1881) 7 App Cas 96 (109) : 51 L J P C 11, *Citizens Insurance Co. of Canada* v. *Parsons.*

[13] 1939 P C 53 (56) [AIR V 26] (PC), *Attorney-General of Alberta* v. *Attorney-General of Canada.* (Similar observation in AIR 1914 P C 174 (PC).)

[14] 1914 P C 174 (179) [AIR V 1] (PC), *John Deere Plow Co. Ltd.* v. *T. F. Wharton.*

[15] 1939 F C 1 (7) [AIR V 26] (FC).

(e) Reconciliation of conflicting entries.

In construing the entries in the legislative lists, it is the duty of the Court to try to reconcile them with each other in all cases of overlapping and to see that, as far as possible, none of the entries becomes a dead letter and the legislative power of each Legislature under the different entries is maintained.[16]

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[16] **1951 S C 318 (322) (Pr 7) [AIR V 38 C 55] : 1951 S C R 682 (693) : 52 Cri L Jour 1361 (SC),** *State of Bombay* v. *F. N. Balsara.* (Government of India Act, 1935, List I, Entry 19 can be reconciled with List II, Entry 31—"Import" in former does not include 'sale or possession, in latter.)

1951 S C 69 [AIR V 38 C 10] : 1951 S C R 51 (SC), *State of Bombay* v. *Narottamdas.* (This case is a good instance of how overlapping legislative entries should be reconciled.

(Per *Mahajan, Mukherjea and Fazl Ali JJ.*)—List II, Entry I, Government of India Act, 1935, includes jurisdiction but it deals with general jurisdiction. Specific entries dealing with jurisdiction, namely, List I, Entry 53, List II, Entry 2 and List III, Entry 15, deal with power to make special provisions as to jurisdiction and powers of Court in regard to particular matters. (At pp. 84, 85, 88) (Prs 50, 68).

(Per *Das J.*)—List II, Entry 1 does not deal with jurisdiction because jurisdiction forms the subject-matter of specific entries, in the three legislative lists. But this does not mean that the Provincial Legislature has no power to confer general jurisdiction on the Courts, as to the constitution and organization of which it has legislative power under List II, Entry 1. Such general jurisdiction can be conferred by legislation under List II, Entry 2, the expression "any of the matters in this list" in Entry 2 including administration of justice mentioned in Entry 1. (At pp. 95, 97) (Prs 90, 94).)

1939 P C 53 (56) [AIR V 26] (PC), *Attorney-General of Alberta* v. *Attorney-General of Canada.*

1921 P C 148 (159) [AIR V 8] (PC), *Great West Saddlery Co.* v. *King.*

1914 P C 174 (177) [AIR V 1] (PC), *John Deere Plow Co. Ltd.* v. *T. F. Wharton.*

1949 F C 81 (88) (Pr 19) [AIR V 36 C 13] : 1948 F C R 207 (FC), *Ralla Ram* v. *Province of East Punjab.*

1939 F C 1 (11) [AIR V 26] (FC), *In re C. P. Motor Spirit Act.* (*Gwyer C. J.*—"It has been shown that if each legislative power is given its widest meaning, there is a common territory shared between them and an overlapping of jurisdictions is the inevitable result; and this can only be avoided if it is reasonably possible to adopt such an interpretation as would assign what would otherwise be common territory to one or the other. To do this, it is necessary to construe the legislative power defined or described by one entry or the other in a more restricted sense than it can theoretically possess. It is a fundamental assumption that the legislative powers of the Centre and Provinces could not have been intended to be in conflict with one another and therefore we must read them together and interpret, or modify the language in which one is expressed by the language of the other".)

1955 Assam 249 (265) (Pr 41) [(S) AIR V 42 C 59] (SB), *H. P. Barua* v. *State of Assam.*

1952 Cal 740 (748) (Pr 61, 66) [AIR V 39] (SB), *Bhuwalka Bros. Ltd.* v. *Dunichand.*

1954 All 728 (731) (Pr 10) [AIR V 41 C 289] : 1954 Cri L Jour 1485 : ILR (1954) 2 All 199 (DB), *Durgeshwar* v. *Secretary, Bar Council.*

It has already been seen in NOTE 6 that where a certain matter falls within both Lists 1 and 2, that is, both the Union and State Lists, the Parliament will have exclusive power of legislation with regard to it and the State Legislature will have no legislative power in such a case. But it is the duty of the Courts to reconcile the entries in the two lists so as to give effect to all of them and to preserve intact the legislative power of each Legislature, as far as possible, and it is only as a last resort that the superior and predominant legislative power of Parliament in cases of overlapping must be invoked.[17]

1954 Bom 188 (190, 191) (Pr 5) [AIR V 41 C 51] : ILR (1954) Bom 41 (DB), *Municipal Corpn.* v. *Gordhandas.*

1954 Madh B 111 (112) (Pr 3) [A I R V 41 C 54] : ILR (1954) Madh B 440 (DB), *Murlidhar* v. *Kadam Singh.* (Sch. VII, List 2, Item 37 which empowers State Legislature to legislate about election to State Legislature does not deprive Parliament of its power to legislate for election to State Legislature under List 1, Entry 72.)

1954 Mys 161 (162) (Pr 3) [AIR V 41 C 67] : ILR (1954) Mys 255 (DB), *A. S. Ramaiya* v. *State of Mysore.* (Sch. VII, List II, Entry 66 cannot be construed as taking away the right given in Entry 3 of the same list which gives a power to enact a law imposing court-fees.)

1950 Bom 221 (223) (Pr 4) [AIR V 37 C 60] : ILR (1950) Bom 290 : 51 Cri L Jour 1207 (DB), *Kishori Shetty* v. *Emperor.*

1949 Bom 197 (199) (Pr 3) [AIR V 36 C 57] : ILR (1950) Bom 260 (DB), *Mulchand* v. *Raman Shah.*

(1937) 1 All E R 249 (256) : 106 L J P C 17, *Forbes* v. *Attorney-General of Manitoba.*

(1882) 7 App Cas 829 (839, 840) : 51 L J P C 77, *Russell* v. *The Queen.* ("Few, if any, laws could be made by Parliament for the peace, order and good government of Canada which did not in some incidental way affect property and civil rights; and it could not have been intended, when assuring to the Provinces exclusive legislative authority on the subjects of property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it. The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs." —(Observations regarding Ss. 91 and 92, British North America Act, 1867).)

[17] 1951 S C 318 (322) (Pr 7, 8) [AIR V 38 C 55] : 1951 S C R 682 : 52 Cri J Jour 1361 (SC), *State of Bombay* v. *F. N. Balsara.*

1949 F C 81 (86, 88) (Pr 13, 19, 21) [AIR V 36 C 13] : 1948 F C R 207 (FC), *Ralla Ram* v. *Province of East Punjab.*

1939 F C 1 (8, 11, 31) [AIR V 26] (FC), *In re C. P. Motor Spirit Act.*

1940 Bom 307 (310) [AIR V 27] : 42 Cri L Jour 74 (SB), *Emperor* v. *Dantes.* (On this principle there is no difficulty in reconciling the two items (List I, Item 19 and List II, Item 31) by holding that the Provincial Legislature has no power to legislate under Item 31 in respect of possession of intoxicants in such a way as to encroach upon the right to import and export across the customs frontier.)

1954 All 728 (731) (Pr 10) [AIR V 41 C 289] : ILR (1954) 2 All 191 : 1954 Cri L Jour 1485 (DB), *Durgeshwar* v. *Secretary, Bar Council.*

1954 Bom 254 (Pr 6) [A I R V 41 C 73] : I L R (1954) Bom 544 (DB), *F. E. Darukhanawalla* v. *Khemchand.* (It was only when rents had to be controlled as something additional to the regulation of house accommodation in

In the words of Gwyer, C. J., the *non obstante* clause in this article, which gives the exclusive legislative power to the Parliament in case of overlapping of entries in the Union and State Lists, ought to be regarded as a last resource, "a witness to the imperfections of human expression and the fallibility of legal draftsmanship.[18]"

In *Municipal Commissioner, Ahmedabad* v. *Gordhandas,*[19] Gajendragadkar, J., of the Bombay High Court, observed as follows with reference to the legislative lists in the Government of India Act, 1935 :

> "The principles which must be borne in mind in dealing with an argument of conflict between two entries in the different lists in the Government of India Act, 1935, are fairly well settled. In regard to the topics mentioned in each one of the lists, the sovereignty of the Legislature empowered to deal with those topics is undoubtedly absolute. When we deal with any specific entry in these lists, we should normally give to the words used in describing the entry their largest denotation; these words should be construed liberally and in their broad sense. If, as a result of such construction, conflict between entries in the two lists appears inevitable, we should, if we reasonably can, attempt to put a narrower and more restricted construction on the words used in either or both of the entries in question so as to avoid the conflict. It is only if the Court is satisfied that on no reasonable construction can conflict be avoided that the question of trespass has to be faced and considered. If the Provincial Legislature trespasses upon the sphere reserved for the Central Legislature, the Act of the Provincial Legislature must obviously be held to be invalid by reason of the *non obstante* clause in S. 100 of the Government of India Act, 1935."

When the text is ambiguous and the words of the relevant legislative entries are wide enough to bring a particular matter within

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the cantonment area that the power of Parliament arose to deal with that subject. Therefore State was competent to enact amending Act XLIII of 1951 amending Bombay Rents, Hotel and Lodging House-Rates Control Act (5 of 1947) and to apply it to the cantonment area.)

1954 Bom 188 (190, 191) [AIR V 41 C 51] : ILR (1954) Bom 41 (DB), *Municipal Commissioner, Ahmedabad* v. *Gordhandas.*

1941 Mad 913 (917) [AIR V 28] (DB), *Province of Madras* v. *Paidanna.*

[18] 1939 F C 1 (8) [AIR V 26] (FC), *In re C.P. Motor Spirit Act.*

[19] 1954 Bom 188 (190, 191) (Pr 5) [AIR V 41 C 51] : ILR (1954) Bom 41 (DB). [But see 1954 Bom 204 (205) [A I R V 41 C 53] : I L R (1954) Bom 434 (DB), *A. C. Patel* v. *Vishwanath.* (In interpreting Government of India Act, legislative entries, it is permissible to rely on corresponding entry (in this case List I, Item 3) in the Constitution to show what was the intention of the Constitution-makers, because it is well known that the Constitution was based upon the Government of India Act, and the Court must look at the constitutional history in order to construe expressions used in the Government of India Act and in the Constitution.)]

the legislative jurisdiction of the Parliament as well as the State Legislature, recourse must be had to the context and scheme of the Constitution.[20] Where the Constitution contains what purports to be an exhaustive enumeration and division of legislative powers between the Federal and Provincial Legislatures (as in the present Constitution), the language of the one list may be coloured or qualified by that of the other.[21]

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[20] 1947 P C 44 (47) [AIR V 34 C 10] (PC), *Attorney-General of Canada* v. *Att.-Gen. of the Province of Quebec.* (Whole scheme of distribution of powers to be looked at.)

1929 P C 53 (56) [A I R V 26] (PC), *Att.-Gen. of Alberta* v. *Att.-Gen. of Canada.* (Whole scheme for distribution of legislative powers to be considered.)

1943 F C 11 (12) [A I R V 30] (F C), *Governor-General in Council* v. *Madras Province.* (Madras General Sales Tax Act, 1939, is valid.)

1942 F C 33 (35) [AIR V 29] (FC), *Madras Province* v. *Boddu Paidanna & Sons.* (*Reversing* AIR 1941 Mad 913—Madras General Sales Tax Act, 1939, is valid — Even tax on first sales is not excise.)

1939 F C 1 (5) [A I R V 26] (F C), *In re C. P. Motor Spirit Act.* (The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938 levying a tax on retail sales of motor spirit and lubricants is not *ultra vires* the Legislature, since it is a tax on the sale of goods within the meaning of Sch. VII List II, entry 48, Government of India Act, 1935, and is not a duty of 'excise' within the meaning of entry No. 45, List I Sch. VII.)

(1912) 1912 App Cas 571 (583, 584) : 81 L J P C 210, *Att.-Gen. for Ontario* v. *Att. Gen. for Canada.* (In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether —On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself (as, for example, a power to make laws for some part of His Majesty's dominions outside of Canada) or otherwise is clearly repugnant to its sense.)

[21] 1945 P C 98 (101) [AIR V 32] : 1945 F C R 179 : ILR (1945) Kar (P C) 153 : 72 Ind App 91 (PC), *Governor-General in Council* v. *Madras Province.*

1914 P C 174 (177) [AIR V 1] (PC), *John Deere Plow Co. Ltd.* v. *T. F. Wharton.*

1939 F C 1 (5) [AIR V 26] (FC), *In re C. P. Motor Spirit Act.*

1939 Mad 361 (365) [AIR V 26] (FB), *Nagaratnam* v. *Seshayya.*

1954 All 728 (731) (Pr 10) [A I R V 41 C 289] : 1954 Cri L J 1485 : ILR (1954) 2 All 191 (DB), *Durgeshwar* v. *Secretary Bar Council.* (If necessary the meaning given to one entry should be restricted in order to avoid overlapping. The meaning given to a general power in one entry may be restricted to give sense and efficacy to a power given by way of exception under an entry of another list.)

(1924) 1924 App Cas 328 (341) : 93 L J P C 137, *Attorney-General for Ontario* v. *Reciprocal Insurers.*

(1881) 7 App Cas 96 (109) : 51 L J P C 11, *Citizens Insurance Co. of Canada* v. *Parsons.*

In *Citizens Insurance Co. of Canada* v. *Parsons*,[22] Sir Montague Smith, in dealing with Ss. 91 and 92 of the British North America Act, 1867, observed as follows:

> "In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each Legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other."

The process of reconciling different legislative entries involves as a necessary consequence that although, when the legislative entries are taken in isolation from each other, an entry may be wide enough to cover certain matter, its scope will have to be restricted and a narrower meaning will have to be attributed to the entry so as to exclude from it any particular aspect of the same matter which is covered by another entry.[23] This is also in accordance with the

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22. (1882) 7 App Cas 96 (108) : 51 L J P C 11.

23. 1955 S C 504 (526) [(S) A I R V 42 C 82] : (1955) 2 S C R 303 (S C), *Amar Singhji* v. *State of Rajasthan*. (Rajasthan Land Reforms and Resumption of Jagirs Act (6 of 1952) in pith and substance deals with "acquisition" and not "resumption" of lands and so, falls under Entry 36, List II, Sch. VII—Though Act also falls under Entry 18, Entry 36 being a specific entry which covers the Act, it should be held to fall under Entry 36.)

1952 S C 252 (283) (Pr 90) [A I R V 39] : 1952 S C R 889, 1020 & 1056 : I L R 31 Pat 565 (S C), *State of Bihar* v. *Kameshwar Singh*. (In this case it was argued that the Bihar Land Reforms Act fell under List II, Entry 18 and not List II, Entry 36—The object of the contention was that if it was held that the Act fell under Entry 18, there would be no objection on the ground of failure to provide for compensation to the expropriated owners or on the ground of want of public purpose—The contention was, however, rejected as it would make Entry 36 entirely redundant and so it was held that to give a meaning to both the entries, Entry 18 should be so read as to comprise all matters, connected with land and land tenures except acquisition of land while Entry 36 should be read as comprising acquisition of land — Per *Das J.*)

1949 P C 190 (193) (Pr 11, 12) [A I R V 36 C 56] (P C), *Attorney-General of Saskatchewan* v. *Attorney-General of Canada*. (British North America Act, 1867, Ss. 91, 92—Dominion Legislature having exclusive power to legislate in respect of "interest" — Provincial statute varying stipulation in contract as to rate of interest or postponing contractual date of payment of interest would be invading dominion sphere—Dominion power cannot be understood to be limited to the power to pass statutes dealing with usury. *Board of Trustees of Zethbridge Irrigation District* v. *Independent Order of Foresters and Attorney General of Canada*, 1940 App Cas 513, *Rel. on.* The relevant item in S. 91 (Dominion Powers) is "Interest" and that in S. 92 (Provincial Powers) is "Civil rights.")

1921 P C 148 (158, 159) [AIR V 8] (P C), *Great West Saddlery Co.* v. *King*. (The rule of construction is that the general language in the heads of S. 92 (British

North America Act) yields to particular expressions in S. 91, where the latter are unambiguous. The rule may also apply in favour of the Province in construing merely general words in the enumerated heads in S. 91. Whether an exception is to be read in either case depends on the application of the principle that language which is merely general is, as a rule, to be harmonized with expressions that are at once precise and particular by treating the latter as operating by way of exception.)

1920 P C 202 (203) [A I R V 7] (P C), *Paquet* v. *Corporation of Pilots Quebec.* (British North America Act (1867), Ss. 91 and 92— Navigation and shipping are mentioned as subjects exclusively belonging to the Dominion Parliament in section 91 of the Act. It is true that the class of subjects designated as "Property and Civil Rights" in S. 92 and there given exclusively to the Province would be trenched upon if that section were to be interpreted by itself. But the language of S. 92 has to be read along with that of S. 91 and the generality of the wording of S. 92 has to be interpreted as restricted by the specific language of S. 91 in accordance with the well established principle that subjects which in one aspect may come under S. 92 may in another aspect that is made dominant be brought within S. 91. Hence the power to make laws regarding the pilotage system of any harbour must be held to exclusively belong to the Dominion Parliament, notwithstanding that in any particular case it may affect the question of civil rights and property of any body of persons, which subject is a Provincial subject according to the general section, S. 92.)

1914 P C 174 (177) [AIR V 1] (P C), *John Deere Plow Co. Ltd.* v. *T. F. Wharton.* (British North America Act (1867), Ss. 91, 92—The expression "Civil rights in the Province" is a very wide one extending, if interpreted literally, to much of the field of the other heads of S. 92 and also to much of the field of S. 91. But the expression cannot be so interpreted and it must be regarded as excluding cases expressly dealt with elsewhere in the two sections, notwithstanding the generality of the words—British North America Act (1867), Ss. 91, 92 — "Property and Civil Right" in S. 92 must be given a limited meaning so as to exclude cases expressly dealt with in the two sections.)

1939 F C 1 (8, 10) [A I R V 26] (F C), *In re C. P. Motor Spirit Act.*

1943 All 26 (32) [A I R V 30] : 44 Cri L Jour 216 (FB), *Salig Ram* v. *Emperor.* (Government of India Act, 1935—"Constitution and organization of all Courts" in item 1, Provincial List, are general and wide enough to cover constitution of Criminal Courts, but latter is *specifically* provided for in Concurrent List III, item 2 as it is included in 'Criminal Procedure Code' and so List III, item 2 applies and not List II, item 1.)

1954 All 728 (732, 734) (Pr 16, 22) [A I R V 41 C 289] : I L R (1954) 2 All 191 : 1954 Cri L Jour 1485 (DB), *Durgeshwar* v. *Secretary, Bar-Council.* (The provision in Entry 78 of List 1 is by way of an exception to Entry 26 of List 3. The power conferred by Entry 26 of List 3 is general but since there is a power conferred by Entry 78 of List 1 with respect to persons entitled to practice before the High Courts, the general power must be read subject to that power and a legislation with respect to Advocates must be held to come within Entry 78 of List 1 regardless of whether it comes within Entry 26 of List 3 or not. Thus, the Indian Bar Councils (U. P. Amendment) Act, 1950, is a legislation with respect to 'persons entitled to practise before the High Courts' in Entry 78 of List 1. Hence the U. P. Amendment Act is *ultra vires* the U. P. State Legislature.)

1954 Bom 188 (190, 191) [A I R V 41 C 51] : I L R (1954) Bom 41 (DB), *Municipal Corporation* v. *Gordhandas.* (In case of conflict a narrower interpretation should be put, if reasonably possible, on one or both the entries.)

1954 Mad 291 (302) (Pr 20) [A I R V 41 C 125] : I L R (1953) Mad 1175 (DB), *A. M. S. S. V. M. & Co.* v. *State of Madras.* (It is an extravagant contention to put forward that a law as to fishing for which specific provision is made in Entry 21 of the State List is a law relating to inter-State commerce and therefore *ultra vires* List 1, Entry 42.)

1952 Bom 261 (265) (Pr 8) [AIR V 39]: ILR (1953) Bom 446, *J. N. Duggan* v. *I.-T. Commr. Bombay City.* (When the topic of legislation clearly falls under a specific entry it is not open to rely on another entry merely for the purpose of getting over the limitation placed on the competence of the Legislature under former entry. For example under Government of India Act, 1935, List I, Entry 55, tax can be levied on *capital value* of assets of *individuals and companies.* Under List I, Entry 54, *income-tax* can be levied on other categories of assessees as well and there is no limitation as to the categories of assessees—S. 12B of Income-tax Act introduced by I. T. & E. P. T. (Amendment) Act, 22 of 1947, falls under List I, Entry 55 being tax on *capital value of assets.* It cannot be contended that as S. 12B is wide and includes tax on *all* categories of assessees, it should be regarded as coming under List I, Entry 54 and not List I, Entry 55.)

1952 Pepsu 12 (13, 14) (Pr 6) [AIR V 39 C 8] : 3 Pepsu L R 465, *Sardara Singh* v. *Custodian, Muslim Evacuees' Property.* (Administration of Evacuee Property Act (21 of 1950), S. 12, is not *ultra vires*—List II, Item 18 (land) is general, List III, Item 41 (evacuee property) is particular and so preferable.)

(1887) 12 App Cas 575 (586) : 56 L J P C 87, *Bank of Toronto* v. *Lambe.* (Lord Hobhouse: Words "regulation of trade and commerce" in British North America Act, S. 91, Cl. 2, were held in *Severn's Case* (2 Supreme Court of Canada 70) to invalidate license duty imposed by Provincial Law. But since that case, the Privy Council in *Parson's Case*, (1881) 7 App Cas 96, has held it absolutely necessary that the literal meaning of the words should be restricted in order to afford scope for powers which are given exclusively to "Provincial Legislatures".)

(1881) 7 App Cas 96 (108) : 51 L J P C 11, *Citizens Insurance Company of Canada* v. *Parsons.*

[*See* 1951 S C 69 (82) (Pr 48) [A I R V 38 C 10] : 1951 S C R 51 (SC), *State of Bombay* v. *Narottamdas Jethabhai.* (Bombay City Civil Courts Act, 40 of 1948, S. 3, is not *ultra vires* of Bombay Legislature—The section was impugned as a trespass on the power of the Central Legislature under Government of India Act, 1935, List I, Entry 53—Contention was rejected—Fazl Ali, Mahajan and Mukherjea JJ., held that List II, Entry I "administration of justice" and "Constitution and organization of all Courts" covered "general jurisdiction" of Courts and was not affected by the special items as to jurisdiction in List I, Entry 53, List II, Entry 2 and List III, Entry 15—But Patanjali Sastri and Das JJ., held that List I, Entry 53, List II, Entry 2 and List III, Entry 15 applied to the question of *jurisdiction* of Courts and not List II, Entry 1, although if that entry had stood alone and the other entries did not exist, it would have been wide enough to include the topic of *jurisdiction* of Courts, but List II, Entry 2 is wide enough to include "general" jurisdiction of Courts, as one of "the matters in List II," the same being covered by Entry 1 and so, they also concurred in holding that the section was not *ultra vires.*)

1954 Mys 161 (162) (Pr 3) [A I R V 41 C 67] : I L R (1954) Mys 255 (DB), *A. S. Ramaiya* v. *State of Mysore.* ('Fees' in Item 66 in List II could only mean fees other than court-fees as the latter has already been expressly provided for in Item 3.)]

[See however 1941 F C 47 (56, 58) [A I R V 28] (F C), *Subrahmanyan* v. *Muttuswami.* (Per *Sulaiman J.* — The maxim *generalibus specialia derogant* cannot be appropriately applied to the three competing Lists I, II and III of maxim *generalibus specialia derogant* (things special derogate from things general). In *In re C. P. Motor Spirit Act*,[24] Gwyer, C. J., observed as follows :

> "It has been shown that if each legislative power is given its widest meaning, there is a common territory shared between them and an overlapping of jurisdictions is the inevitable result; and this can only be avoided if it is reasonably possible to adopt such an interpretation as would assign what would otherwise be common territory to one or the other. To do this it is necessary to construe this legislative power defined or described by one entry or the other in a more restricted sense than, as already pointed out, it can theoretically possess. . . . . . It is a fundamental assumption that the legislative powers of the Centre and Provinces could not have been intended to be in conflict with one another, and therefore we must read them together and interpret or modify the language in which one is expressed by the language of the other. Here are two separate enactments, each in one aspect conferring the power to impose a tax upon goods; and it would accord with sound principles of construction to take the more general power, that which extends to the whole of India, as subject to an exception created by the particular power, that which extends to the Province only. It is not perhaps strictly accurate to speak of the provincial power as being excepted out of the federal power, for the two are independent of one another and exist side by side. But the underlying principle in the two cases must be the same, that a general power ought not to be so construed as to make a nullity of a particular power conferred by the same Act and operating in the same field, when by reading the former in a more restricted sense, effect can be given to the latter in its ordinary and natural meaning."

Further, where there are two entries which are precisely expressed, the meaning of one of them should not be stretched so as

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Sch. 7. In its fullest scope, S. 100, Government of India Act, means that if it happens that there is any subject in List II which also falls in List I or List III, it must be taken as cut out from List II. On this strict interpretation there would be no question of any real overlapping at all. If a subject falls exclusively in List II and no other list then the power of the Provincial Legislatures is supreme. But if it does also fall within List I then it must be deemed as if it is not included in List II at all. Similarly, if it also falls in List III, it must be deemed to have been excluded from List II. The dominant position of the Central Legislature with regard to matters in List I and List III is thus established. But the rigour of the literal interpretation is relaxed by the use of the words "with respect to" which only signify "pith and substance," and do not forbid a mere incidental encroachment. But this is subject to the doctrine of occupied field.)]

[24] 1939 F C 1 (8, 10) [A I R V 26] (F C).

to encroach on the field of the other.[25] In *Ram Krishna Ramnath* v. *Kamptee Municipal Committee*,[26] the Supreme Court observed as follows :

> "It is natural enough, when considering the ambit of an express power in relation to an unspecified residuary power, to give a broad interpretation to the former at the expense of the latter. The case, however, is different where, as in the Constitution Act, there are two complementary powers, each expressed in precise and definite terms. There can be no reason in such a case for giving a broader interpretation to one power rather than to the other; and there is certainly no reason for extending the meaning of the expression 'duties of excise' at the expense of the provincial power to levy taxes on the sale of goods."

Similar words were used by Lord Simonds in *Governor-General in Council* v. *Madras Province*,[27] in which he observed :

> "The Indian Constitution is unlike any that have been called to their Lordships' notice in that it contains what purports to be an exhaustive enumeration and division of legislative powers between the Federal and Provincial Legislatures. Where there is such an enumeration, the language of the one list may be coloured or qualified by that of the other. The problem is different when on the one hand there are specific, and on the other residuary, powers."

But the scope of legislative entry must not be narrowed except to the extent to which the particular aspect of the same topic is covered by another entry. In other words, each entry must be given its amplest significance and its scope should not be restricted except to the extent that is necessary to give effect to other legislative entries.[28] (See NOTE 14.)

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[25] **25.** 1950 S C 11 (13, 14) [A I R V 37 C 4] : 1950 S C R 15 (S C), *Ramkrishna Ramnath* v. *Kamptee Municipal Committee*. (An octroi duty on beedis levied under S. 66 (1) (e), C. P. and Berar Municipalities Act, 1922, comes within the exact wording of Entry 49 of List II of Sch. VII, Government of India Act, 1935, and is not *ultra vires*—Field covered by Entry 45 in List I "excise duty on tobacco" is not invaded.)

1945 P C 98 (101) [A I R V 32] : 72 Ind App 91 : 1945 F C R 179 : I L R (1945) Kar (P C) 153 (P C), *Governor-General in Council* v. *Madras Province*. (List 1, Entry 45 and List 2, Entry 48 in Sch. VII of the Government of India Act, 1935, can be reconciled without doing violence to the language of either entries by holding that excise duty does not include tax on first sale by manufacturer. So Madras General Sales Tax Act, 1939, is not *ultra vires*.)

1939 F C 1 (31) [A I R V 26] (F C), *In re C. P. Motor Spirit Act*. (Sales Tax on motor spirit imposed by Provincial Legislature is not *ultra vires* — It is not covered by "excise" duty within List 1, Entry 45.)

[26] **26.** 1950 S C 11 (13) (Pr 9) [A I R V 37 C 4] : 1950 S C R 15 (S C).

[27] **27.** 1945 P C 98 (101) [A I R V 32] : 1945 F C R 179 : I L R (1945) Kar (P C) 153 : 72 Ind App 91 (P C).

The topic of a legislative provision may fall under two or more entries of the same legislative list and in such a case there is no question of any one entry prevailing over the rest, the result of all the entries being the same, namely, that the topic is covered by that particular legislative list.[29]

An Act must be construed as far as possible so as to bring it within the purview of the legislative power of the particular Legislature which had passed it.[30] This is on the principle that where two

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28. 1951 S C 69 (87, 88) [A I R V 38 C 10] : 1951 S C R 51 (S C), *State of Bombay* v *Narottamdas.* (Per *Fazl Ali, Mahajan and Mukherjea JJ.*—Government of India Act, 1935, Sch. VII, List II, Entry 1 "Administration of justice" and "Constitution and organization of all Courts" would cover *general* jurisdiction of Courts and List I, Entry 53, List II, Entry 2 and List III, Entry 15 only cover special jurisdiction about the matters in the respective lists—A I R 1951 Bom 180 confirmed on this point—A I R 1949 Bom 197, *Approved*—Patanjali Sastri and Das JJ. *Contra*—But List II Entry 2 includes *general jurisdiction* as a matter in that List, the same being covered by Entry 1.)

1955 Assam 249 (286) (Pr 6) [(S) A I R V 42 C 59] (S B), *H. P. Barua* v. *State of Assam.*

1952 Bom 261 (Pr 5) [A I R V 39] : I L R (1953) Bom 446 (DB), *J. N. Duggan* v. *I.-T. Commr., Bombay City.* (Liberal interpretation and widest import and significance to be given to language used by Parliament.)

29. 1951 All 674 (678, 679) (Pr 9, 16) [A I R V 38 C,182] : I L R (1952) 2 All 46 (FB), *Suryapalsingh* v. *U. P. Government.* (Although the subjects dealt with in the three legislative lists are not always set out with scientific precision and instances will be found of overlapping, it is clear that a Legislature empowered to legislate on a subject included within particular list will sustain its power whether it is derived from one entry or from more than one entry.)

1954 Mad 993 (1000, 1001) (Pr 29) [A I R V 41 C 313] : 1954 Cri L Jour 1521 : I L R (1955) Mad 887 (DB), *In re A. S. Krishna.* (All the provisions of the Madras Prohibition Act (X of 1937) deal primarily with Provincial subjects, namely, intoxicating liquors and narcotic drugs. It is true that violation of the provisions of the Act have been made criminal offences. But such offences would certainly be covered by item 37 of List II, and they have been expressly excluded from item 1 of the Concurrent List. The ancillary matters laying down the procedure for trial of such offences and the enactment of certain presumptions which would apply in the course of such trial would be covered completely by item 2 of List II. Consequently, none of the impugned provisions, namely, Ss. 28 to 32 of the Act, including S. 4 (2) of the Prohibition Act, is invalid, on the ground that they are repugnant to the provisions of an existing Indian Law in respect of a subject covered by the Concurrent List, *e. g.*, Criminal Procedure Code. Moreover the Code of Criminal Procedure has not completely occupied the *field* of criminal procedure in the matter of search warrants.)

[*See also* 1914 P C 174 (177) [A I R V 1] (P C), *John Deere Plow Co. Ltd.* v. *T. F. Wharton.* (British North America Act, 1867, Ss. 91, 92—Incorporation of Companies for other than Provincial purposes falls both under the residuary power in the beginning of S. 91 and also under head 2 'Trade and commerce.')]

30 1952 Bom 16 (26, 28) [A I R V 39 C 2], *State of Bombay* v. *Heman Santlal.* (Bombay Land Requisition Act, 33 of 1948, was within legislative competence constructions are possible that construction must be preferred which would uphold the validity of an Act. (See ART. 245, NOTE 16.)

(f) Consequential effects of legislation not material for vires.

Consequential effects are not the same thing as legislative *subject-matter*. It is the true nature and character of the legislation and not its ultimate economic or other results that matter in determining whether it falls within the jurisdiction of a particular Legislature.[31] Thus, there is a distinction between legislation in

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when it was enacted — But under Sch. 7, List II, Entry 36 of the Constitution, Provincial Legislature can legislate with regard to acquisition or requisition of property except for purposes of the Union—While enacting the Bombay Land Requisition Amendment Act (2 of 1950) by which the 1948 Act was extended for a further period of 2 years, the Bombay Legislature was legislating for requisitioning of land for 'any purpose' as contemplated by the original Act and the presumption would be that it was using that expression only with reference to those purposes which were within its competence under List II, Entry 36. Hence the expression 'for any purpose' must be construed to mean as "for any purpose other than the purpose of the Union". So construed the Amending Act would also be *intra vires.*—A I R 1941 F C 42 (F C), *Rel. on.*)

[31] 1951 S C 318 (322) (Pr 8) [A I R V 38 C 55] : 1951 S C R 682 (697) : 52 Cri L Jour 1361 (S C), *State of Bombay* v. *F. N. Balsara.* (Bombay Prohibition Act is not an Act relating to *import* and export of intoxicating liquors though imports may be indirectly affected.)

1949 P C 190 (193) (Pr 10) [A I R V 36 C 56] (P C), *Attorney General of Saskatchewan* v. *Attorney General of Canada.*

1950 F C 69 (71) [A I R V 37 C 7] : 1949 F C R 650 : 51 Cri L Jour 1018 (F C), *Kishori Shetty* v. *The King.* (It may be that a general adoption of the policy of prohibition by the Provinces will lead to a fall in the import of foreign liquors and to a consequential diminution of the Central customs revenue but where the Constitution Act has given to the Provinces legislative power with respect to a certain matter in clear and unambiguous terms, the Court should not deny it to them or impose limitations on its exercise, on such extraneous considerations.)

1941 F C 47 (51) [A I R V 28] (FC), *Subrahmanyan* v. *Muttuswami.*

1941 F C 16 (35) [A I R V 28] (F C), *United Provinces* v. *Atiqa Begum.* (*Sulaiman J.* : It is not enough that the law in its working somehow overreaches that subject—It has to be seen whether it appertains to such matter substantially and *directly* and not only whether it would in actual operation affect any such matter.)

1939 F C 1 (13) [A I R V 26] (FC), *In re C. P. Motor Spirit Act.* (Where the authority of the Provincial Legislature to legislate certain Act is clear, though it may be otherwise if there were real ambiguity or doubt, then the Act should not be held to be invalid merely because *it may be feared that that authority may be abused in future.* Hence, the circumstance that the general adoption by the provinces of the method of taxing retail sales of goods imported in the province may indirectly diminish the Central excise revenue by reducing the consumption of goods cannot be taken into consideration in determining the validity of the Act.)

1952 Pat 359 (366) [A I R V 39] : ILR 31 Pat 493 (SB), *Atma Ram* v. *State of Bihar.* (Taxation of passengers travelling by buses (List II, Item 56) may indirectly affect the business of motor transport. But that will not affect the validity of the statute.)

relation to agriculture and legislation which may produce a favourable effect upon the strength and stability of that industry. Where what is sought to be statutorily modified is a contract between two parties one of which is an agriculturist but the other of which is a lender of money, the legislation is not in relation to agriculture, however broadly the phrase "agriculture in the province" may be construed and whatever advantages to the farmers, the reshaping of their mortgages or agreements for sale might confer.[32] (See also Notes 9, 14 and 16.)

9. Doctrine of pith and substance. — It has been seen in NOTE 8 that the entries in the legislative lists, when taken separately, will be found to overlap each other in many cases, and that therefore they have to be read together and reconciled with each other so as to avoid rendering any of them nugatory. It has also been seen that the entries have to be construed with reference to the actual piece of legislation, the validity of which is under consideration in each case and that the relative scopes of the entries cannot be considered merely in the abstract. In order to see whether a particular legislative provision falls within the jurisdiction of the Legislature which has passed it, the Court must consider what constitutes in pith and substance the true subject-matter of the

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1951 Mad 979 (981, 984) (Prs 7, 11, 13) [AIR V 38 C 339] (DB), *Narasaraopeta Electric Corporation* v. *State of Madras*. (The subject-matter of Madras Electricity Supply Undertakings (Acquisition) Act (43 of 1949) is the acquisition of undertakings supplying electricity. It may be that as a result of the acquisition under the powers conferred by the Act, some of the companies who happen to be licensees may be deprived of part of their business. But the Act in no way affects the capacity or the status of the company. It does not alter its constitution. It takes away only part of the business. It cannot be said that the subject-matter of the Act is 'Corporations' within Item 33 of List I of the 7th Schedule. On the other hand, it comes within the purview of 'electricity' in the Concurrent List (List III, Entry 31, Government of India Act, 1935). Hence the Act is *intra vires* the Provincial Legislature.)

1942 Cal 429 (433) [A I R V 29] (DB), *Satish Chandra* v. *Sudhir Krishna*. (What has to be determined in each case is the *subject* of the legislation and not what things or operations it may indirectly affect.)

[32] 1949 P C 190 (193) (Pr 10) [A I R V 36 C 56] (PC), *Attorney-General of Saskatchewan* v. *Attorney-General of Canada*.

[*See also* 1941 F C 47 (66) [AIR V 28] (FC), *Subrahmanyan* v. *Muttuswami*. ("Agriculture" in Government of India Act, 1935, List II, Entry 20 must be understood as signifying the process of agriculture though other allied matters are brought in by a kind of inclusive enumeration and cannot comprehend a subject like agricultural indebtedness, merely because relief of such indebtedness may contribute to the prosperity and efficiency of agriculture. The decision of the Privy Council in *Att. Gen. for Canada* v. *Att.-Gen. for British Columbia*, (1930) 1930 App Cas 111, putting a limited interpretation upon the reference to fisheries in S. 91, British North America Act, may lend some support to this principle of strict interpretation of the term "agriculture".)]

legislation and whether such subject-matter is covered by the topics enumerated in the legislative list pertaining to that Legislature.[1]

In determining the true subject-matter of a legislation the name given to it by the Legislature is not decisive.[2] If in pith and substance a legal provision falls within the legislative field of the particular Legislature by which it has been enacted, the validity of such legal provision will not be affected even if it incidentally

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Article 246 — Note 9

[1] 1955 S C 504 (520) (Pr 30) [(S) A I R V 42 C 82] : 1955-2 S C R 303 (SC), *Amar Singhji* v. *State of Rajasthan.* (Rajasthan Land Reforms and Resumption of Jagirs Act (6 of 1952) — Contention that Sch. VII, List II did not contain any entry about "resumption" of jagirs and so the Act was *ultra vires* —It was contended that List II, Entry 36 which mentioned "acquisition" of lands would not cover the Act as "resumption" was different from "acquisition" : *Held* that the two conceptions "resumption" and "acquisition" were different but that the mere name given by the Legislature was not decisive of the real subject-matter of the Act and that its pith and substance must be examined. The Act in question held was really one for "acquisition" of lands and came under Entry 36 of List II.)

1940 All 272 (278) [AIR V 27] (FB), *Atiqa Begam* v. *Abdul Maghni.*

1956 Bom 1 (4) (Pr 3, 4) [(S) A I R V 43 C 1] : I L R (1955) Bom 680 (DB), *State of Bombay* v. *Chamarbaugwalia.*

1955 Bom 439 (442) (Pr 19) [(S) AIR V 42 C 117] : ILR (1955) Bom 1039 : 1955 Cri L Jour 1564 (DB), *Radhabai* v. *Bombay of State.* (Bombay Prevention of Hindu Bigamous Marriages Act (25 of 1946)—Validity—The whole Act deals with subject of marriage and words "either or both the contracting parties to such marriage are domiciled in this province" merely describe the class of persons to whom the provisions of the Act are made applicable. The Act cannot be regarded as a legislation on the subject of domicile.)

1954 All 728 (732, 734) (Prs 15, 20) [AIR V 41 C 289] : ILR (1954) 2 All 191 : 1954 Cri L Jour 1485 (DB), *Durgeshwar* v. *Secretary, Bar Council.* (One must have regard to substance and not to the *form* of the law—State Legislature cannot legislate on matter not falling in List 2 or List 3, by professing merely to *adopt* a law made by another Legislature and not *make* a law.)

1954 Hyd 121 (124) [AIR V 41 C 43] : ILR (1954) Hyd 143 (DB), *Chandriah* v. *Civil Administrator.* (It is not safe to determine the subject of legislation by the name that the particular enactment bears or the label put on it, nor would it be sound to examine the legislation in bulk.)

[*See* 1954 S C 251 (252) [AIR V 41 C 55] : 1954 S C R 779 (SC), *Rajahmundry E. S. Corporation* v. *State of Andhra.* (Madras Electricity Supply Undertakings (Acquisition) Act, 43 of 1949, is in pith and substance nothing but an Act to provide for acquisition of electrical undertakings and not an Act with respect to 'electricity' (List 3 and Entry 31) or 'Corporations' List 1, Entry 33, Government India Act, 1935.)]

[2] 1955 S C 504 (518) (Pr 23) [(S) AIR V 42 C 82]: 1955-2 S C R 303 (SC), *Amar Singhji* v. *State of Rajasthan.* (Rajasthan Land Reforms and Resumption of Jagirs Act (6 of 1952) — In pith and substance it deals with 'acquisition' of lands and falls under List II, Entry 36 — Name given to legislation by Legislature is not decisive and the fact that there is no entry dealing with 'resumption' in List II does not make the Act *ultra vires.*)

trenches upon a topic within the legislative jurisdiction of another Legislature.[3]

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[3] 1953 S C 83 (86) [AIR V 40 C 23] : ILR (1953) Punj 639 : 1953 S C R 319 : 1953 Cri L Jour 525 (SC), *Darshan Singh* v. *State of Punjab.* (Legislation on provincial subjects of production, distribution and supply of goods—Restriction of export as ancillary to production and supply of essential commodities would be within the scope and ambit of such legislation — East Punjab Cotton Cloth and Yarn (Regulation of Movement) Order, 1947, passed under Essential Supplies (Temporary Powers Act) 1946—Provisions of Order prohibiting export of cotton cloth and yarn out of India held not *ultra vires.*)

1953 S C 58 (59) (Pr 4) [A I R V 40 C 16] : 1953 S C R 302 (SC), *D. N. Banerji* v. *P. R. Mukherji.* (The power to reinstate dismissed employees which is within the competence of the Tribunal under the *Industrial Disputes Act, 1947* will trench no doubt on the power to appoint and dismiss, conferred on the Chairman and Commissioners of Municipalities under Ss. 66 and 67, *Bengal Municipal Act* This invasion of the Provincial field of legislation does not, however, render the *Industrial Disputes Act* invalid, as the Court has to pay due regard primarily to the pith and substance of the challenged Act in considering the conflict between the two jurisdictions. *Industrial disputes* and *labour disputes* are within the competence of the Central Legislature and the impugned Act deals with this subject and not local Government.)

1952 S C 252 (270) (Pr 35) [AIR V 39] : 1952 S C R 889 (1020, 1056) : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.* (Per *Mahajan J.* — Bihar Land Reforms Act, 30 of 1950 — The law enacted might be taken to relate to several items in the legislative lists, that is, rights in or over land and land tenures, forests, fisheries, mines and minerals, acquisition of property and also principles on which compensation for property acquired is to be determined— The pith and substance of legislation, however, is the transference of ownership of estates to State Government and falls within the ambit of legislative head Entry 36, List II — There is no scheme of land reform within the framework of the statute except that a pious hope is expressed that the Commission may produce one — The Bihar Legislature was competent to make the law on the subject of transference of estates.)

1951 S C 318 (322) [AIR V 38 C 55] : 1951 S C R 682 (694) : 52 Cri L Jour 1361 (SC), *State of Bombay* v. *F. N. Balsara.* (Bombay Prohibition Act of 1949 in pith and substance falls under Sch. II, Entry 31 and not Sch. I, Entry 19, Government of India Act, 1935—Even assuming that prohibition of purchase, use, possession, transport and sale of liquor will affect its import, such a result is only incidental and cannot affect competence of Provincial Legislature: *Gallagher* v. *Lynn*, 1937 App Cas 863; AIR 1947 P C 60 (PC); AIR 1949 F C 81 (FC); AIR 1950 F C 69 (FC), *Ref.*.)

1951 S C 69 (74, 77, 89, 97) [A I R V 28 C 10] : 1951 S C R 51 (SC), *State of Bombay* v. *Narrottamdas.* (Bombay City Civil Court Act, 1948, passed by the Bombay Legislature impugned as trenching upon the central field, as in conferring general jurisdiction on the City Civil Court, it conferred jurisdiction also with reference to matters in the Federal List such as promissory notes, while List 1, Entry 53 conferred jurisdiction on the Central Legislature to legislate as to the jurisdiction and powers of Courts in regard to matters in the Central List—*Held* (by Fazl Ali J.) that in pith and substance the Act came within List II, Entry 1 and only incidentally trenched upon List 1, Entry 53 (at page 74) (Pr 16) — Per *Sastri* and *Das JJ.*—The Act fell within List II, Entry 2 and only incidentally trenched on List I, Entry 53 : AIR 1947 P C 60

(PC), *Foll.*—(Sastri J. (p. 77) (Pr 28) (Das J.) (p. 97) (Pr 94))—Per *Mukherjea J.*: Entry 1, List II, dealt with general jurisdiction and Entry 53, List I related to special jurisdiction. So the Act which only dealt with the general jurisdiction did not trench on List I, Entry 53 and so there was no necessity to apply the pith and substance doctrine for holding that the Act is *intra vires.* (p. 89) (Pr 69).)

1949 P C 190 (Prs 14, 19, 20, 21) [A I R V 36 C 56] (PC), *Att.-Gen. of Saskatchewan* v. *Att.-Gen. of Canada.* (British North America Act, 1867, Ss. 91, 92—In order to see whether a provincial legislation deals with subject-matter which exclusively falls under the Dominion sphere regard must be had to the substance and not to the mere form of the enactment, so that "you cannot do that indirectly which you are prohibited from doing directly". If under colour of an arrangement which purports to deal only with the principal of a debt, it is really the contractual obligation to pay *interest* on the principal which is modified, the enactment should be regarded as dealing with interest (a subject-matter which falls exclusively under Dominion sphere under British North America Act, S. 91.)

1947 P C 66 (66) (Pr 6) [A I R V 34 C 15] : 74 Ind App 45 : 1947 F C R 54 : ILR (1947) Kar (PC) 159 (PC), *Bank of Commerce* v. *Amulya Krishna.* (The pith and substance of the Bengal Money-lenders Act, 10 of 1940, is money-lending and therefore it is within the competence of the Provincial Legislature and of that Legislature alone under Item 27 of the Provincial List of the Seventh Schedule to the Government of India Act, 1935. Confirming on appeal AIR 1944 F C 18 ; AIR 1940 P C 60, *Rel. on.*)

1947 P C 60 (63, 64, 65) (Prs 18, 31, 42, 43) [AIR V 34 C 14] : 74 Ind App 23 : 1947 F C R 28 : ILR (1947) Kar (PC) 161 (PC), *Prafulla Kumar* v. *Bank of Commerce, Khulna.* (Do—AIR 1945 F C 2 (FC), *Reversed.*)

1947 P C 44 (47) (Pr 17) [A I R V 34 C 10] (PC), *Attorney-General of Canada* v. *Attorney-General of Quebec Province.* (British North America Act, 1867, Ss. 91 and 92—It is within competence of the Dominion Parliament to provide for matters which, though otherwise within the competence of the Provincial Legislatures, are necessarily incidental to effective legislation by the Parliament of the Dominion on a subject of legislation expressly enumerated in S. 91. Legislation coming in pith and substance within one of the classes specially enumerated in S. 91 is beyond the legislative competence of the Provincial Legislature under S. 92 : *A.-G. of Canada* v. *A.-G. of British Columbia,* (1930) A C 111 (118), *Foll.*)

1945 P C 98 (99) [AIR V 32] : 72 Ind App 91 : 1945 F C R 179 : ILR (1945) Kar (PC) 153 (PC), *Governor-General in Council* v. *Madras Province.* (It is not the name of the tax but its real nature, its "pith and substance" as it has sometimes been said, which must determine into what category it falls.)

1944 P C 7 (11) [AIR V 31] : ILR (1945) Mad 1 (P C), *Abitibi Power, etc. Co.* v. *Montreal Trust Co.* (The pith and substance of Abitibi Power and Paper Co. Ltd. Moratorium Act, 1941, was to regulate property and civil rights within the *Province* and did not relate to *Bankruptcy and Insolvency* which was a *Dominion subject* and as such it was valid.)

1943 P C 76 (80) [AIR V 30] (PC), *Att-Gen. of Alberta* v. *Att-Gen. of Canada.*

1937 P C 89 (91) [A I R V 24] (PC), *Att-Gen. of Canada* v. *Att-Gen of Ontario.* (British North America Act, Ss. 91 and 92—Dominion legislation, even though it deals with *Dominion* property, may yet be so framed as to invade civil rights within the Province or encroach upon the classes of subjects which are reserved to provincial competence—If on true view of legislation it is found that in reality and in pith and substance the legislation invades civil rights within the Province or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. The substance of the *Employment and Social Insurance Act, 1935*, is contained in the sections constituting Part 3. They set up a new familiar system of unemployment insurance under which persons engaged in employment as defined in the Act are insured against unemployment. The funds required for making the necessary payments are to be provided partly from money provided by Parliament, partly from contributions by employed persons and partly from contributions by the employers of those persons. The two sets of contributions are to be paid by revenue stamps. Every employed person and every employer is to be liable to pay contributions in accordance with the provisions of Sch, 2, the employer being liable to pay both contributions in the first instance, recovering the employed person's share by deduction from his wages, or if necessary in certain cases by action : *Held*, there could be no doubt that *prima facie* provisions as to instances of this kind, especially where they affected the contract of employment, fell within the class of property and civil rights in the province, and would be within the exclusive competence of the Provincial Legislature. As in pith and substance this Act was an Insurance Act affecting the civil rights of employers and employed in each province, it was invalid.)

1921 P C 148 (158) [AIR V 8] (PC), *Great West Saddlery Co.* v. *King*.

1914 P C 174 (177) [AIR V 1] (PC), *John Deere Plow Co. Ltd.* v. *T. F. Wharton*.

1950 F C 69 (71) (Pr 4, 7) [AIR V 37 C 7] : 1949 F C R 650 : 51 Cri L Jour 1018 (FC), *Kishori Shetty* v. *The King*. (Bombay Abkari Act (5 of 1878), S. 14B (as amended by Bombay Act 29 of 1947)—Validity—Section 14B in its amended form is covered by Item 31 of List II of Government of India Act. Section 14B does not purport to restrict or prohibit dealings in liquor in respect of its importation or exportation from India. Section 14B in so far as it purported to restrict or prohibit the possession of foreign liquors was not therefore invalid.)

1950 F C 59 (64) (Pr 15) [A I R V 37 C 5] : 1949 F C R 693 : 29 Pat 185 : 51 Cri L Jour 921 (FC), *Lakhi Narayan Das* v. *Province of Bihar*. (Judged by this test, the Bihar Maintenance of Public Order Ordinance, 4 of 1949, is covered entirely by Items 1 and 2 of Provincial List.)

1949 F C 81 (86, 88) (Pr 13, 19, 21) [A I R V 36 C 13] : 1948 F C R 207 (FC), *Ralla Ram* v. *Province of East Punjab*. (Wherever the annual value of property is the basis of a tax, that tax does not necessarily become a tax on income. There are other factors to be taken into consideration. It is the essential nature of the tax charged and not the nature of the machinery which is to be looked at : *In re S. 3, Finance Act (Northern Ireland)*, 1936 A C 352, and *Rex* v. *Special Commissioners of Income-tax* ; *Essex Hall, Ex parte*, 1911-2 K B 434, *Ref.*

In substance, the property tax levied by S. 3, Punjab Urban Immovable Property Tax Act, 1940, falls within item 42 of the Provincial List and is not a tax on income falling within item 54 of the Federal List, Government of India Act, although the basis of the tax is the annual value of the building. It is not impossible to reconcile the seeming conflict between the provisions of the Act in question and the Income-tax Act. The extent of the alleged invasion by the Provincial Legislature into the field of the Federal Legislature is not so great in the case in question as to justify the view that in pith and substance the impugned tax is a tax on income. It is, therefore, within the legislative competence of the Punjab Legislature to levy such a tax : A I R 1940 Bom 65 (FB), *Approved*.)

1941 F C 47 (51) [AIR V 28] (FC), *Subrahmanyan* v. *Muttuswami.* (Gwyer C. J.: Pith and substance of Madras Agriculturists' Relief Act, 4 of 1938, is not negotiable instruments, and it is immaterial that many or even most of the debts with which it deals are in practice evidenced by or based on such instruments. That is an accidental circumstance which cannot affect the question.)

1939 F C 1 (31) [AIR V 26] (FC), *In re C. P. Motor Spirit Act.*

('51) 1951 Mad W N 495, 498 (499) (PC), *Canadian Federation of Agriculture* v. *Attorney-General of Quebec.* (British North America Act, 1867, Ss. 91, 92—Act of Dominion Parliament of Canada held *ultra vires* as falling in pith and substance outside its jurisdiction.)

1951 Nag 58 (73) (Pr 107) [AIR V 38 C 20] : ILR (1951) Nag 646 : 52 Cri L Jour 1140 (FB), *Sheoshankar* v. *State of M. P.* (C. P. & Berar Prohibition Act (7 of 1938)—Subject-matter of Act falls within Government of India Act, 1935, item 31, List II 'intoxicating liquors'—Incidental encroachment on items 19 & 44 of List I, Government of India Act—Act cannot be impugned on ground of repugnancy.)

1949 All 513 (515) (Pr 6) [AIR V 36 C 189] : ILR (1950) All 615 : 50 Cri L Jour 798 (FB), *Basudeva* v. *Rex.*

1949 Cal 1 (11) (Pr 48) [AIR V 36 C 1] : ILR (1949) 2 Cal 94 (FB), *Jnan Prosanna* v. *Province of West Bengal.* (West Bengal Security Act (3 of 1948) in pith and substance is legislation on items 1 and 2 of the Provincial Legislative List and the encroachments upon items 7, 24, 29, 30 and 42 in the Federal Legislative List are merely ancillary to the main purpose of the legislation. The Security Act is not really a criminal law and a criminal procedure amendment Act. Every section in the Act deals with matters germane to public order, preventive detention, persons so detained, and with the jurisdiction of the Courts in respect thereof. The pith and substance of the Act is undoubtedly these matters and that being so, the fact that incidentally it trespasses or encroaches on the Federal Legislative List is immaterial : A I R 1947 P C 60 (PC), *Rel. on.*)

1949 Pat 1 (5) (Pr 5) AIR V 36 C 1] : I L R 27 Pat 773 : 50 Cri L Jour 44 (FB), *Nek Mohammad* v. *Province of Bihar.* (Bihar Maintenance of Public Order Act (5 of 1947) — True nature falls within Government of India Act, List II item 1—Therefore *intra vires.*)

1948 All 369 (Pr 6, 8) [AIR V 35 C 148] : ILR (1948) All 615 : 49 Cri L Jour 545, (FB), *Itwari* v. *Rex.* (Section 10, U.P. Communal Disturbances Ordinance, 1947, is not *ultra vires* the powers of the Governor, on account of the fact that it relates to one of the matters enumerated in Item 29 List 1, Sch. 7, Government of India Act : A I R 1947 P C 60 (PC) and A I R 1941 F C 47 (FC), *Rel. on.* Section 10 is in substance part of the Ordinance. The pith and substance of the Ordinance is the prevention of communal disturbance, a matter which falls within Item 1"Public Order" in List 2 in Sch. 7, Government of India, 1935, and within the legislative field of the Provincial Legislature and therefore of the Governor. The fact therefore that such legislation incidentally trenches in S. 10, upon a subject which lies within the federal field is not material and S. 10 is therefore *intra vires* of the Governor and valid.)

1941 Lah 177 (178, 179) [AIR V 28] (FB), *Megh Raj* v. *Allah Rakhia.*

1940 Bom 65 (67, 70) [AIR V 27] (FB), *Sir Byramjee* v. *Province of Bombay.* (In determining whether a tax imposed by a Legislature is *ultra vires*, the Court must have regard to the pith and substance of the tax which is attacked and not merely to the form in which it may have been imposed. The *mode of assessment does not determine its character*—Bombay Finance Act (2 of 1932), Part 6 is not *ultra vires* and the urban immovable property tax levied by Part 6 is valid. It is not a *tax on income.*)

1939 Mad 361 (365) [AIR V 26] (FB), *Nagaratnam* v. *Seshayya.*

1955 Assam 249 (252) (Pr. 2) [(S) AIR V 42 C 59] (SB), *H. P. Barua* v. *State of Assam.*

1952 Cal 740 (748, 749) (Prs 61, 66, 68, 69) [A I R V 39] (SB), *Bhuwalka Bros. Ltd.* v. *Dunichand.* (The West Bengal Jute Goods Futures Ordinance is *intra vires* as its pith and substance is to regulate trade in jute within the province which falls within List II item 27, Government of India Act, 1935, the provisions in the Ordinance relating to contracts are only incidental encroachment on List III, item 10.)

1952 Pat 359 (366) (Pr 17) [A I R V 39] : ILR 31 Pat 493 (SB), *Atma Ram* v. *State of Bihar.*

1951 Pat 91 (102, 113, 119) (Prs 16, 62, 82) [AIR V 38 C 15] : I L R 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar.* (Per *Special Bench* : — The subject-matter of the Bihar Land Reforms Act, 1950, is within the legislative jurisdiction of the Bihar Legislature. The Act is covered by Entries 36 of List II & 42 of List III in Sch. VII, Constitution of India. It is, therefore, not *ultra vires* of the State Legislature, so far the subject-matter of legislation is concerned.)

1954 Bom 508 (511) [AIR V 41 C 132] : ILR (1954) Bom 1245 : 1954 Cri L Jour 1549 (DB), *Shantilal Vadilal* v. *State of Bombay.* (Press (Objectionable Matter) Act (LVI of 1951), S. 3 (5) — Validity — Competency of Parliament to enact S. 3 (5)—The pith and substance of the Press (Objectionable Matter) Act is not public order, but is "newspapers, books and printing presses." The subject of "newspapers, books and printing presses" falls in the Concurrent List under Entry 39. So it is valid.)

1954 Bom 204 (205) (Pr 3) [AIR V 41 C 53] : ILR (1954) Bom 434 (DB), *A. C. Patel* v. *Vishwanath.* (Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1947) in its application to cantonment areas falls in pith and substance within Government of India Act, 1935, Sch. VII, List 2, Entry 21 and not List 1, Entry 2.)

1954 Cal 591 (600) (Pr 29) [A I R V 41 C 202] : 1954 Cri L Jour 1722 (DB), *Shri Krishna Sharma* v. *The State of West Bengal.* (West Bengal Food Stuffs Anti-Hoarding Order, 1951, Notification No. 2817 D. C. S., dated 27th February, 1946, under the Bengal Rationing Order, 1943, Notification No. 2818 D. C. S., dated 27th February, 1946 and West Bengal Food Grains (Movement Control) Order, 1951, were within the scope and ambit of the legislation permissible to West Bengal Government and in pith and substance the orders issued dealt exclusively with provincial matters. AIR 1953 S C 83 (SC), *Foll.*)

1954 Hyd 121 (123) (Pr 4) [A I R V 41 C 43] : I L R (1954) Hyd 143 (DB), *Chandriah* v. *Civil Administrator.*

1954 Mad 291 (297) (Pr 10) [A I R V 41 C 125] : I L R (1953) Mad 1175 (DB), *A. M. S. S. V. M. & Co.* v. *State of Madras.*

1954 Trav-Co 34 (37, 38) (Pr 4) [AIR V 41 C 12] : ILR (1953) Trav-Co 1073 : 1954 Cri L J 63 (DB), *George* v. *State of Trav-Co.* (Travancore-Cochin Public Safety Measures Act (5 of 1950), S. 3 — The impugned statute is to be examined to ascertain its pith and substance or its true nature and character for the purpose of determining whether it is legislation with respect to matters in this list or in that. Tested in the light of its pith and substance or its true nature and character the subjects dealt with under S. 3, Public Safety Measures Act, do not come under item 42 of List I or under item 33 of List III of Schedule VII but they really come under items 26 and 27 of List II which is the State List. It follows therefore that under cl. (3) of Art. 246 of the Constitution the Legislature of the State was competent to enact the impugned section.)

1953 Pat 337 (338) (Pr 4) [A I R V 40 C 117] : I L R 32 Pat 66 (DB), *Abdul Hasan* v. *State of Bihar.* (The Bihar Land Reforms Act is constitutionally valid even though some of its provisions may trench incidentally on certain matters reserved for Union Parliament. The pith and substance of the Act falls within item 35 of List II and not under items 10 and 28 of List III and therefore the doctrine of repugnancy has no application.)

1953 Pat 105 (108, 109) (Prs 9, 10, 11) [AIR V 40 C 32] : I L R 32 Pat 71 (DB), *Janakinath* v. *State of Bihar*. (Since the Bihar Land Reforms Act (30 of 1950) deals in pith and substance with item 36 of the State List the Act would be constitutionally valid though it incidentally trenches on matters reserved for Union Legislature. It is not a material consideration in such a case to what extent the Union field is invaded by the impugned statute. Even if the Act trenches to some extent on the provisions of the Companies Act, the legislation would be valid since the State Legislature was acting wholly within its powers under the State Legislative List. The Act was intended to apply to the zamindari assets of incorporated companies.)

1953 Pat 65 (70, 71) (Prs 8, 9) [AIR V 40 C 21] (DB), *Shri Durgaji* v. *State of Bihar*. (Bihar Private Forest Act, 1947 (9 of 1948) — Validity — The pith and substance of the Act relates to forests falling under Government of India Act, 1935, List II, item 22 and not to "land" in List II, item 21 and, therefore, the Act was not beyond the powers of the Bihar Legislature.)

1952 Cal 679 (682) (Prs 4, 5) [A I R V 39], *Aswini Kumar* v. *State of West Bengal*. (The West Bengal Land Development and Planning Act (21 of 1948) does not purport to legislate with regard to aliens or immigration. It deals with the subject of compulsory acquisition of property which is Item No. 9 in List 2, that is, the Provincial List of the Government of India Act, 1935. The Act is in pith and substance a legislation dealing with compulsory acquisition of property. It is quite competent for the State Legislature now under the Constitution to legislate for rehabilitation of refugees from foreign countries and such a legislation cannot be impugned on the ground that it is an extra-territorial legislation : A I R 1951 Cal 346, *Rel. on.*)

1952 Pat 39 (40) (Pr 8) [A I R V 39 C 13] : I L R 30 Pat 1075 (DB), *Meghraj* v. *Panchu*. (The two Bihar Money-lenders Acts, one of 1938 and the other of 1939, are valid pieces of legislation as in pith and substance they deal with "money-lenders and money-lending" and no part of the provisions of those two Acts are invalid by reason of any invasion on the negotiability of promissory notes : A I R 1947 P C 60 (PC), *Rel. on.*)

1952 Punj 9 (15, 27) (Prs 22, 119) [A I R V 39 C 2] : I L R (1952) Punj 11 (DB), *Jupiter General Insurance Co.* v. *Rajagopalan*. (Sections 52A to 52G, Insurance Act, were held to be within legislative competence.)

1951 Mad 979 (Pr 7) [A I R V 38 C 339] (DB), *Narasaraopeta Electric Corporation Ltd.* v. *State of Madras*. (Madras Electricity Supply (Undertakings) Act (43 of 1949) falls under Government of India Act, 1935, List III, Entry 31 and not List I, Entry 33, Government of India Act, 1935.)

1950 Bom 221 (224) (Pr 5) [A I R V 37 C 60] : I L R (1950) Bom 290 : 51 Cri L Jour 1207 (DB), *Kishori Shetty* v. *Emperor*.

1950 Orissa 47 (49, 50, 52) (Prs 12, 20, 21) [A I R V 37 C 7] : I L R (1949) 1 Cut 656 (DB), *Gadadhar Ramanuj Das* v. *Province of Orissa*. (Section 49, Orissa Hindu Religious Endowments Act, 4 of 1939, is not *ultra vires* of the Orissa Legislature as its pith and substance falls within Government of India Act, 1935, List II, Items 54 and 34. The encroachment, if any, on List 1, Item 54 (income-tax) is only incidental. The contribution levied under S. 45 is a fee and not a tax—Distinction between tax and fee pointed out.)

1950 Pat 35 (37, 38) (Prs 10, 12, 14) [AIR V 37 C 14] : I L R 28 Pat 782 : 51 Cri L Jour 300 (DB), *Bhutnath* v. *Province of Bihar*. (Bihar Maintenance of

Public Order (No. 2) Ordinance (4 of 1949) held *intra vires*—Pith and substance **falls under List II, Item 1, Government of India Act, 1935.)**

1950 Pesh 1 (5) (Prs 22, 25 to 27) [AIR V 37 C 1] : 51 Cri L Jour 258 (DB), *Shad Mohd.* **v.** *The Crown.*

1949 Bom 197 (200, 201) (Prs 5, 7) [AIR V 36 C 57] : ILR (1950) Bom 260 (DB), *Mulchand* **v.** *Raman Shah.*

1949 Lah 207 (208, 209) [AIR V 36 C 41] : Pak L R (1949) Lah 205 : 50 Cri L Jour 976, *Muhammad Ali* **v.** *The Crown.*

1949 Nag 16 (17) (Pr 5) [AIR V 36 C 10] : ILR (1948) Nag 785 : 50 Cri L Jour 84 (DB), *Raonakali Roshanali* v. *Emperor.* (Government of India Act, 1935—S. 100 (1), Sch. 7, List 1, Items 29 & 42 and List III, Item 2— C. P. and Berar Criminal Procedure Code (Amendment) Ordinance (II of 1948), S. 2 — Pith and substance of S. 2 lies entirely within item 2 of List III (i. e. Criminal Procedure) of Concurrent Legislative List of Constitution Act—It is not *ultra vires*, because it incidentally relates to fire arms and ammunition under item 29 of List I.)

1948 Nag 199 (201) (Pr 7) [AIR V 35 C 69] : ILR (1947) Nag 579 : 49 Cri L Jour 230 (DB), *Om Prakash Mehta* v. *Emperor.*

1942 All 156 (163) [AIR V 29] : 43 Cri L Jour 674, *Emperor* v. *Munna Lal.* (The law which is open to objection under S. 297 (1) of the Government of India Act, 1935, is a law made by the Provincial Legislature *substantially* by virtue of the entry relating to trade and commerce or by virtue of entry relating to production, supply and distribution of commodities. And if a law is made substantially by virtue of the entry relating to development of *industry* it is not open to objection under the section. Further, the law contemplated by this section is a law which prohibits or restricts entry into or export from the province, of goods *directly* and a law which does not deal directly and in substance with prohibition or restriction of export or import of goods but which deals with other needs of the province and provides for them, though incidentally, the effect of the provision is that in some measure export or import is restricted, such a law is not within the meaning of the section.)

(1939) 3 All E R 98 (104, 105) : 1939 App Cas 468, *Ladore* v. *Bennett.* (Under S. 92 (8), British North America Act, 1867, the Province had exclusive power in relation to municipal institutions in the province and the pith and substance of both the Amalgamation Acts, the Ontario Municipal Board Act and the Department of Municipal Affairs Act, was that they were passed in relation to Municipal institutions in the Province. The Acts and the scheme did not infringe the Dominion's exclusive power relating to Bankruptcy or insolvency or civil rights outside the Province. The statutes were not directed to insolvency legislation but they picked out insolvency as one reason for dealing in a particular way with unsuccessful institutions, and though they affected rights outside Province, they only so affected them collaterally as a necessary incident to their lawful powers of good government within the Province.)

(1937) 3 All E R 598 (601) : 1937 App Cas 863, *Gallagher* v. *Lynn.*

(1936) 2 All E R 111 (115) : 1936 App Cas 352, *Re A Referencer under Govt. of Ireland Act, 1920, S. 51.* (In determining the nature of a tax it is the essential character of the particular tax charged that is to be regarded and the nature of the machinery by which the tax is to be assessed is not of assistance except in so far as it may throw light on the general character of the tax.)

(1930) 142 L T 73 (75) : 99 L J P C 20 (23), *Attorney-General for Canada* **v.** *Attorney-General for British Columbia.*

(1928) 1928 App Cas 358 (362, 363) : 97 L J P C 94, *Rex* v. *Caledonian Collieries Ltd.* (**Mine Owners Tax Act, 1923, of the Province of Alberta which imposes upon "mine owners" as therein defined a percentage tax upon the gross revenues of**

Where an impugned Act covers several matters although it may be labelled as a single Act under one title, its validity must be considered with reference to the particular provision that is impeached.[4]

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their coal mines whether *ultra vires* the Province as an attempt to impose indirect taxation — What is the general tendency of the tax in question? — It is necessary to ascertain the real nature of the tax — Their Lordships agreed that the tax in question was not a direct tax—*Bank of Toronto* v. *Lambe*, (1887) 12 App Cas 575 (581, 582), *Foll.*)

(1924) 1924 App Cas 328 (337) : 93 L J P C 137, *Attorney-General for Ontario* v. *Reciprocal Insurers.*

(1907) 1907 App Cas 65 (68) : 76 L J P C 23, *Grand Trunk Railway of Canada* v. *Attorney-General of Canada.* (Dominion Parliament of Canada was held competent to enact S. 1 of Canadian Statute, 4 Edw. VII, C 31, which prohibited 'contracting out,' on the part of the railway companies within the jurisdiction of the Dominion Parliament from the liability to pay damages for personal injury to their servants. The section was ancillary to through railway legislation notwithstanding that it affected civil rights which under S. 92 of the British North America Act were the subject of provincial legislation.)

(1899) 1899 App Cas 580 (587) : 68 L J P C 118, *Union Colliery Co. British Columbia* v. *Bryden.* ("The whole pith and substance of the enactments of S. 4 of the Coal Mines Regulation Act in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects and therefore trench upon the exclusive authority of the Parliament of Canada.")

(1894) 63 L J P C 59 (63) : 1894 App Cas 189, *Attorney-General of Ontario* v. *Attorney-General of Canada.*

(1883) 9 App Cas 117 (129, 130, 132) : 53 L J P C 1, *Hodge* v. *The Queen.* (The Liquor License Act of 1877, c. 181, Revised Statutes of Ontario, which in respect of Ss. 4 and 5 makes regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, &c., does not in respect of those sections interfere with "the general regulation of trade and commerce" but comes within Nos. 8, 15 & 16 of S. 92, British North America Act, 1867, and is within the powers of the Provincial Legislature.)

(1882) 46 L T 889 (893) : 51 L J P C 77, *Russell* v. *The Queen.*

(1880) 5 App Cas 409 (415, 416) : 49 L J P C 63, *Cushing* v. *Dupuy.* ("It is to be presumed — indeed it is a necessary implication—that the Imperial Statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights and procedure within the provinces, so far as a general law relating to these subjects might affect them. Parliament of Canada would not infringe the exclusive powers given to the Provincial Legislatures, by enacting that the judgments of the Court of Queen's Bench in matters of insolvency should be final and not subject to appeal as of right to Her Majesty in Council allowed by Art. 1178 of the Code of Civil Procedure.")

[But see 1941 Pat 99 (104, 105) [AIR V 28] (DB), *Sagarmal* v. *Bhuttu Ram.* (Must be deemed as overruled by AIR 1947 P C 60 (P C).)]

[4] 1954 Hyd 121 (124) (Pr 5) [AIR V 41 C 43] : ILR (1954) Hyd 143 (DB), *Chandriah* v. *Civil Administrator.* (Defence of Hyderabad Regulation does not pertain only to the defence of Hyderabad—It contains within it laws with respect to other matters as well — It is more or less a bundle of several pieces of legislation—It is no good attacking the Defence of Hyderabad Regulation in an abstract manner that it is *ultra vires* but it ought to be shown which enactment

A State Act, one part of which is covered by the State List and another part by the Concurrent List, is valid.[5]

In *State of Bombay* v. *F. N. Balsara*,[6] Fazl Ali J., of the Supreme Court observed :

> "It is well settled that the validity of an Act is not affected if it incidentally trenches on matters outside the authorised field, and therefore it is necessary to enquire in each case what is the pith and substance of the Act impugned. If the Act, when so viewed, substantially falls within the powers expressly conferred upon the Legislature which enacted it, then it cannot be held to be invalid merely because it incidentally encroaches on matters which have been assigned to another Legislature."

In *Prafulla Kumar* v. *Bank of Commerce, Khulna*,[7] it was argued before the Privy Council that where the topics in the three legislative lists in the Government of India Act, 1935, overlap each other the Courts were simply to apply the rule of priority laid down in S. 100 of the Act and that there was no need to reconcile them so as to preserve the legislative power conferred by the items in the legislative lists on the respective Legislatures by giving a narrower interpretation to some of the entries than the words taken by themselves might require. In rejecting this argument their Lordships observed :

> "In their Lordships' opinion this argument should not prevail. To take such a view is to simplify unduly the task of distinguishing between the powers of divided jurisdictions. It is not possible to make so clean a cut between the powers of the various Legislatures : they are bound to overlap from time to time. . . . . No doubt, experience of past difficulties has made the provisions of the Indian Act more exact in some particulars (than the British North America Act and the Australian Commonwealth Act) and the existence of the concurrent list has made it easier to distinguish between matters which are essential in determining to which list particular provisions should be attributed and those which are merely incidental. But the overlapping of subject-matter is not avoided by substituting three lists for two or even by arranging

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under the Regulation is *ultra vires* — Order requisitioning house is not *ultra vires.*)

[5] 1954 All 655 (657) (Pr 2) [AIR V 41 C 260] : 1954 Cri L Jour 1399 (DB), *Tej Bahadur Singh* v. *State.* (U. P. Panchayat Raj Act (28 of 1947), falls both under List II and List III of Sch. VII of Government of India Act, 1935.)

[6] 1951 S C 318 (322) (Pr 8) [A I R V 38 C 55] : 1951 S C R 682 (694) : 52 Cri L Jour 1361 (SC).

[7] 1947 P C 60 (Prs 34, 37, 38, 39) [AIR V 34 C 14]: 74 Ind App 23 : 1947 F C R 28 : ILR (1947) Kar P C 161 (PC). (Observations of Gwyer C. J. in A I R 1941 F C 47 (FC), quoted with approval.)

for a hierarchy of jurisdictions. Subjects must still overlap and where they do, the question must be asked what in pith and substance is the effect of the enactment of which complaint is made, and in what list its true nature and character is to be found. If these questions could not be asked, much beneficient legislation would be stifled at birth, and many of the subjects entrusted to provincial legislation could never effectively be dealt with."

In *Subrahmanyan* v. *Muttuswami*,[8] Gwyer, C. J., observed as follows :

> "It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its 'pith and substance,' or its 'true nature and character,' for the purpose of determining whether it is legislation with respect to matters in this list or in that : *Citizens Insurance Co.* v. *Parsons*,[9] *Russell* v. *The Queen*,[10] *Union Colliery Co.* v. *Bryden*,[11] *Attorney-General for Canada* v. *Attorney-General for British Columbia*,[12] *Board of Trustees of Northern Irrigation District* v. *Independent Orders of Foresters*.[13] In my opinion, this rule of interpretation is equally applicable to the Indian Constitution Act (Government of India Act, 1935)."

In *Gallagher* v. *Lynn*,[14] Lord Atkin observed as follows :

> "It is well established, by *Russell* v. *The Queen*,[15] that you are to look at the 'true nature and character of the legislation ..... the pith and substance of the legislation.' If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if, incidentally, it affects matters which are outside the authorized field. The legislation must not, under the guise of dealing with one matter, in fact encroach upon the forbidden field."

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8. 1941 F C 47 (51) [AIR V 28] (FC).
9. (1882) 7 App Cas 96 : 51 L J P C 11.
10. (1882) 7 App Cas 829 : 51 L J P C 77.
11. (1899) 1899 App Cas 580 : 68 L J P C 118.
12. (1930) 1930 App Cas 111 : 99 L J P C 20.
13. (1940) 1940 App Cas 513 : 3 F L J P C 27 (PC).
14. (1937) 3 All E R 598 (601) : 1937 App Cas 863.
15. (1882) 46 L T 889 : 51 L J P C 77.

In *John Deere Plow Co. Ltd.* v. *T. F. Wharton*,[16] Viscount Haldane, dealing with Ss. 91 and 92 of the British North America Act, 1867, observed as follows :

> "It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them, may in a different aspect and for a different purpose fall within the other. In such cases, the nature and scope of the legislative attempt of the Dominion or the Province, as the case may be, have to be examined with reference to the actual facts, if it is to be possible to determine under which set of powers it falls in substance and in reality."

In *Russell* v. *The Queen*,[17] it was observed :

> "The true nature and character of the legislation in the particular instance under discussion must always be determined in order to ascertain the class of subjects to which it really belongs."

In considering the true character of a piece of legislation from the point of view of the matters assigned to different Legislatures by the Constitution, the Courts must have regard to all the relevant circumstances connected with the problem. As mentioned in NOTE 8, the whole scheme for distribution of powers contained in the Constitution must be considered. The entries in the legislative lists must be compared with each other thoroughly with a view to ascertaining whether the legislation in question, fairly considered, falls *prima facie* within the one list rather than in the other.[18] The Court is also entitled to look at the effect of the legislation as well as the object or purpose of the Act in question.[19] In *Attorney-General of Alberta* v. *Attorney-General of Canada*,[20] Lord Maugham, in dealing with Ss. 91 and 92 of the British North America Act, 1867, observed as follows :

> "The next step in a case of difficulty will be to examine the effect of the legislation : *Union Colliery Co. of British Columbia* v. *Bryden*.[21] For that purpose the Court must take into account

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16. 1914 P C 174 (177) [AIR V 1] (PC).

17. (1882) 46 L T 889 (893) : 51 L J P C 77.

18. 1939 P C 53 (56, 57) [AIR V 26] (PC), *Attorney-General of Alberta* v. *Attorney-General of Canada.*

19. 1939 P C 53 (56, 57) [AIR V 26] (PC), *Attorney-General of Alberta* v. *Attorney-General of Canada.*

20. 1939 P C 53 (56, 57, 58) [AIR V 26] (PC).

21. (1899) 1899 App Cas 580 : 68 L J P C 118.

[*See also* 1954 Hyd 121 (123, 124) [AIR V 41 C 42] : ILR (1954) Hyd 143 (DB), *Chandriah* v. *Civil Administrator.* (It is not safe to determine the subject of the legislation by the name that the particular enactment bears or the label that is put on it, nor would it be sound to examine the legislation in bulk. No doubt legislation with regard to the defence of India is a matter within any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of legislation will be. Clearly, the Acts passed by the Provincial Legislature may be considered, for it is often impossible to determine the effect of the Act under examination without taking into account any other Act operating or intended to operate or recently operating in the Province.

A closely similar matter may also call for consideration, namely, the object or purpose of the Act in question."

But it must be remembered that the question for determination is what is the real *subject-matter* of the legislation from the point of view of the matters enumerated in the legislative lists. The effect or consequence of a legislation and the object of the Legislature in enacting it must not be confused with the subject-matter of the legislation, although they are relevant factors in difficult cases for determining what is the real subject-matter of legislation.[22] (See also NOTE 8).

The Preamble to an Act although relevant is not conclusive on the question of the real subject-matter of legislation.[23]

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the exclusive province of the Parliament of India. But the Defence of Hyderabad Regulation is not a Regulation which pertains only to the law relating to the defence of Hyderabad. The Regulation contains within it laws with regard to other matters as well. It is more or less a bundle of several pieces of legislation. Decidedly the State can pass laws with regard to 'acquisition' and 'requisition.' Therefore, if the law covers any of the subjects mentioned in List II or List III of the 7th Schedule to the Constitution, the State Legislature would be competent to legislate and the law would be *intra vires*. One of the purposes is the public safety and interest or, in other words, the maintenance of public order. 'Public order' is the first item in the list of subjects on which the State is empowered to legislate.)]

[22] *See* 1951 S C 69 (77) (Pr 28) [AIR V 38 C 10] : 1951 S C R 51 (73) (SC), *State of Bombay* v. *Narottamdas*. (Compare observations of Patanjali Sastri J., who says that the subjective point of view of the legislator rather than the objective aspect of the legislation is the determining factor—He quotes and relies upon AIR 1944 F C 18 and Lefroy on the Canadian Constitution.)

(1937) 3 All E R 598 (601) : 1937 App Cas 863, *Gallagher* v. *Lynn*. (Per *Lord Atkin*—"Nor are you to look only at the object of the legislator. An Act may have a perfectly lawful object, but may seek to achieve that object by invalid methods. In other words, you may certainly consider the clauses of an Act to see whether they are passed in respect of the forbidden subject:" *Russel* v. *The Queen*, (1882) 7 App Cas 829 : 51 L J P C 77, *Foll.*)]

[23] 1950 F C 67 (69) (Pr 8) [AIR V 37 C 6] : 1949 F C R 657 : 51 Cri L Jour 1011 (FC), *Rex* v. *Basudeva*.

1954 All 655 (656, 657) (Prs 2, 3) [AIR V 41 C 260] : 1954 Cri L Jour 1399 (DB), *Tej Bahadur* v. *State*. (Underlying purpose and policy of an Act are disclosed by its title, preamble and provisions—U. P. Panchayati Raj Act (28 of 1947)—Validity of—Although the Preamble to the Act may indicate that the Act came under List II, Item 13 (Local Government), Government of India Act, 1935, the U. P.

Where the *vires* of a statute is being questioned and it is said that the statute is beyond the competence of the Legislature, the rules framed under the Act can be called in aid in order to understand the scheme and purpose of the legislation.[24]

The extent of invasion on the legislative field of another Legislature is only important for the purpose of determining what is the pith and substance of the impugned Act and the validity of the Act cannot be determined by discriminating between degrees of invasion.[25] In *Prafulla Kumar* v. *Bank of Commerce, Khulna*,[26] the Privy Council in dealing with the validity of the Bengal Money-lenders Act, 10 of 1940, observed as follows :

> "Thirdly, the extent of the invasion by the Provinces into subjects enumerated in the Federal List has to be considered. No doubt it is an important matter, not, as their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with Provincial matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money-lending but promissory notes or banking? Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content."

Legislature had power under Items 1, 2, 5 and 15 of List III on subjects of criminal law, criminal procedure, evidence and constitution and jurisdiction of Courts—Hence, provisions with respect to latter topics are not *ultra vires* —Legislatures when enacting a particular statute do not, in that statute itself, lay down provisions indicating what power of legislation is being exercised in enacting that statute. It is from the provisions of the statute itself and by reference to the legislative power granted to the Legislatures that it is to be inferred what particular power is exercised in enacting a particular provision of the statute.)

[24] 1952 Pat 359 (365) (Pr 15) [AIR V 39] : I L R 31 Pat 493 (SB), *Atma Ram* v. *State of Bihar*. ((1871) 6 Ch A 875, *Ex parte Wier*; AIR 1952 Pat 106, *Ref.*)

[25] 1951 S C 69 (77) [AIR V 38 C 10] : 1951 S C R 51 (SC), *State of Bombay* v. *Narottamdas*. (Even if the *incidental* encroachment of a Provincial Act extends to the whole of the field demarcated by an entry in the 'Central' List, the Act will be *intra vires*—Bombay City Civil Courts Act, 1948, is *intra vires*.)

1947 P C 60 (65) [AIR V 34 C 14] : 74 Ind App 23 : 1947 F C R 28 : ILR (1947) Kar (PC) 161 (PC), *Prafulla Kumar* v. *Bank of Commerce, Khulna*.

1952 Pat 39 (40) (Pr 8) [AIR V 39 C 13] : I L R 30 Pat 1075 (DB), *Meghraj* v. *Panchu*.

[26] 1947 P C 60 (65) [AIR V 34 C 14] : 74 Ind App 23 : 1947 F C R 28 : I L R (1947) Kar (PC) 161 (PC).

From the above discussion it is clear that where an Act passed by a State Legislature falls in pith and substance within its jurisdiction, it will be valid although it trenches incidentally on a matter in *Union List*. This raises the question whether the doctrine of pith and substance and incidental encroachment does not constitute a violation of the principle of priority of the Union Legislature in case of overlapping of the legislative entries in the two lists. On this point, it is settled that the principle of priority of the Union Legislature is not infringed by the application of the doctrine of pith and substance to a provincial enactment.[27] The reason is that the question of priority of the Union Legislature arises only where the subject-matter of legislation falls within *both* the legislative lists and in order to determine whether a piece of legislation falls within both the legislative lists one must have regard to its true nature and character—its pith and substance. If in pith and substance the legislation falls within the State List and only incidentally touches upon a matter in the Union List, it means that the legislation, according to its true nature and character, only falls within the State List, and not within both the State and Union Lists. Hence, from the point of view of the true nature and character of the legislation there is no overlapping in such a case and there is no occasion for the application of the principle of priority of the Union Legislature. In this connection also, a passage may be quoted from the judgment of the Privy Council in *Prafulla Kumar's case*[28] already referred to. In that case, after setting forth the doctrine of pith and substance as applied to the question of the validity of the Bengal Money-lenders Act, 1940, their Lordships observed as follows:

> "This view places the precedence accorded to the three lists in its proper perspective. No doubt, where they come in conflict List 1 has priority over Lists 3 and 2 and List 3 has priority over List 2, but, the question still remains, priority in what respect? Does the priority of the Federal Legislature prevent the Provincial Legislature from dealing with any matter which may incidentally affect any item in its list or in each case has one to consider what the substance of an Act is and, whatever its ancillary effect, attribute it to the appropriate list according to its true character? In their Lordships' opinion the latter is the true view."

Where an Act falls in pith and substance within the jurisdiction of the Legislature by which it has been passed, it is *wholly* within the competence of such Legislature, although it incidentally encroaches on the legislative field of another Legislature. The point to be noted is that the Act is valid in its entirety and not only with reference to the portion which is included in the field of the Legislature which has passed the Act. So, no question of severability of the Act arises in such a case as it does where the Act is partly within the competence of the Legislature which has passed it and partly beyond its competence. In the latter case, if the two parts of the Act are severable, then the one which is within the competence of the Legislature will be valid and the other will be invalid.[28a] If the two parts are not severable, then the whole Act will be invalid. Where an Act imposes taxes on a number of separate items, only some of which are within the competence of the Legislature, the validity of the tax may be considered separately with regard to each item and the doctrine of pith and substance does not apply in such a case, as there is no question of overlapping of the legislative entries.[29]

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[27] 1951 S C 69 (77) (Pr 27) [A I R V 38 C 10]: 1951 S C R 51 (S C), *State of Bombay* v. *Narottamdas.*
1947 P C 60 (65) (Pr 38) [A I R V 34 C 14]: 74 Ind App 23: 1947 F C R 28: I L R (1947) Kar (P C) 161 (P C), *Prafulla Kumar* v. *Bank of Commerce, Khulna.*

[28] 1947 P C 60 (65) (Pr 39) [A I R V 34 C 14]: 74 Ind App 23: 1947 F C R 28: ILR (1947) Kar (PC) 161 (PC), *Prafulla Kumar* v. *Bank of Commerce, Khulna.*

(a) Applicability of the pith and substance rule to entries in same List.

The question does not seem to be decided whether the rule of pith and substance applies to entries in the same legislative list. In *Atmaram* v. *State of Bihar*[30] the Patna High Court has expressed the view that the rule applies to the entries in the same list also, so that when it becomes necessary to decide under which of two or more entries in the same list certain Act falls the rule of pith and substance may be applied. In that case certain provisions of the Bihar Finance Act (17 of 1950), were impugned as infringing the right of free trade or business conferred by ART. 19 (1) (g) of the Constitution. It was held by the Special Bench that the impugned provisions were in pith and substance only taxing provisions and did not affect, except incidentally, trade and commerce and that, therefore, the objection raised was not tenable. Sarjoo Prosad J., observed as follows in the course of his judgment :

> "It is next contended that by imposing those restrictions the Act affects the right of free 'trade or business' which the citizens enjoy under ART. 19 (g) of the Constitution. This argument fails to take notice of the main purpose of the legislation which is to tax goods and passengers carried by road. The subject of 'trade and commerce within the State' falls under Entry 26 of LIST 2 of Sch. VII of the Constitution and is quite distinct from Entry 56 of the said list relating to taxes on goods and passengers. The indirect effect of the taxation or the incidents thereof may be to interfere with the trade of motor transport. What has to be looked into is the pith and substance of the legislation and not the indirect effects thereof.

[28a] 1954 Mad 291 (297) (Pr 10) [A I R V 41 C 125] : I L R (1953) Mad 1175, *A. M. S. S. V. M. & Co.* v. *State of Madras.*

[29] 1942 F C 14 (17) [A I R V 29] (F C), *Lahore Municipality* v. *Daulat Ram.*

[30] 1952 Pat 359 (366) (Pr 17) [A I R V 39] : I L R 31 Pat 493 (S B).

It is well settled that the Legislature in framing the legislation on a particular subject may incidentally encroach upon certain other fields of legislation but that will not affect the *vires* of the legislation so long as the Legislature is acting within the bounds of the constitutional field allotted to it, and the primary object of the legislation falls within that bound. That is what is called the pith and substance rule ; and the rule, in my opinion, applies with equal force to different subjects of legislation in the same list. Taxation is not a restraint on trade unless it is discriminatory in its character and is levied with the object of helping one person or party against the other. The Court will, therefore, be reluctant to declare a taxing statute unconstitutional merely because it is claimed that the legislation may result in some kind of interference with trade or commerce which may be indirectly the unavoidable consequence of all taxing statutes. If the subject of the legislation is within the taxing authority of the Legislature concerned, that should be sufficient to sustain it : See, for instance, *United States* v. *Doremus*[31] and *J. W. Bailey* v. *Drexel Furniture Co.*[32]"

Sarjoo Prosad, J., had also expressed a similar view in an earlier case, *Ratan Roy* v. *State of Bihar*.[33] But some observations of Patanjali Sastri, J., in the Supreme Court decision in *State of Bombay* v. *Narottam Das*,[34] and in the Federal Court decision in *Rex* v. *Basudeva*[35] seem to imply that the rule of pith and substance only applies to cases where it has to be determined whether a certain enactment falls within the legislative field of one Legislature or within that of another. Similarly, some of the observations of Gwyer, C. J., in *United Provinces* v. *Atiqa Begum*[36] seem to lend colour to the view that the rule of pith and substance only applies where the question for decision is whether a certain Act falls within one legislative list or another.

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[31] (1919) 249 U S 86 (89) : 63 Law Ed 493.

[32] (1922) 66 Law Ed 817 : 259 U S 20.

[33] 1950 Pat 332 (346) (Pr 54) [AIR V 37 C 88]: ILR 29 Pat 410 : 51 Cri L Jour 1251 (D B). (Term "pith and substance" is not a term of art but a term of convenience—The doctrine can be applied when considering question of repugnancy between a Central Act and Provincial Act on a matter in the concurrent list (Art. 254) —Meredith C. J. *contra*.)

[34] 1951 S C 69 (76) (Pr 24) [AIR V 38 C 10]: 1951 SCR 51 (S C). (The observations in question were as follows:—"But that doctrine (pith and substance doctrine), while it often furnishes the key to the solution of problems arising out of the distribution of overlapping legislative powers in a federal system, is not of much assistance in meeting the difficulty in finding any usefulness in Entry 2 (Govt. of India Act, 1935, Sch. VII List II), if under Entry 1 (of same List) the Provincial Legislature were intended to have the power to legislate generally with respect to the jurisdiction and powers of Courts.")

[35] 1950 F C 67 (68) (Pr 6) [AIR V 37 C 6]: 1949 F C R 657: 51 Cri L Jour 1011 (F C). (A I R 1949 All 513 (F B), *Approved*.)

[36] 1941 F C 16 (26) [A I R V 28] (F C). (The observations in question were as follows:—"It seems unnecessary to consider what the pith and substance of the Act is, for that question does not arise unless the Court is enquiring whether a

It is submitted that the rule of pith and substance only means that one must have regard to the real character of an enactment while determining the question of its validity and there does not seem to be any reason why the rule should not be applied, when the choice is between entries in the same legislative list.[37]

It is also submitted that the observations of Patanjali Sastri, J., and those of Gwyer, C. J., above referred to, do not really amount to laying down that the rule of pith and substance cannot be applied to entries in the same legislative list. Their Lordships were not dealing with the question whether the rule of pith and substance is applicable to the determination of the question whether an enactment falls under one rather than another of the entries in the same legislative list. Their Lordships' observations seem only to lay down that there is no occasion for the application of the rule of pith and substance when there is no competition between two or more legislative entries in their application to a particuler enactment and the only question before the Court is as to the meaning and scope of a particular legislative entry. Thus, in *Rex* v. *Basudeva*,[38] the only question was whether a provision as to the detention of persons, who habitually indulge in black-marketing, was for preventive detention for reasons connected with "maintenance of public order" within the meaning of Government of India Act, 1935, SCH. VII, LIST 2, Item 1, and there was no question of any competition between the above item and any other item. It was held by the Federal Court that the impugned provision was not covered by Item 1, LIST 2 of the Government of India Act and that it was therefore *ultra vires*. It was in this connection that Patanjali Sastri, J., delivering the judgment of the Federal Court, observed as follows :

"Turning to the main question, the learned Judges below

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particular Act falls within one Legislative List or another. In the present case, there is no suggestion of any competition between List I and List II and if the Act does not fall within List II (since no one has suggested that it falls within List III) it can only be an Act with respect to a subject-matter which has been overlooked or forgotten and no Legislature in India can deal with it until the Governor-General had exercised his powers under S. 104, Constitution Act.")

[37] *See* 1955 S C 504 (520) (Pr 30) [(S) AIR V 42 C 82]: 1955-2 S C R 303 (SC), *Amar Singhji* v. *State of Rajasthan*. (In this case, it was held that the Rajasthan Land Reforms and Resumption of Jagirs Act (6 of 1952) was covered, in pith and substance, by Sch. VII, List II, Entry 36 and that although Entry 18 of same List would also cover the Act, there being a specific entry which covered it, the Act fell under such entry.)

[38] 1950 F C 67 (68) (Pr 6) [A I R V 37 C 6] : 1949 F C R 657 : 51 Cri L Jour 1011 (FC).

invoked, somewhat unnecessarily, what may be called the pith and substance rule for a true solution of the problem. That rule has been evolved by the Judicial Committee for determining whether a particular statute is legislation with respect to matters in the one or the other of the lists in SCH. VII. No such question arises in the present case. The real question is whether the preventive detention provided for in S. 3 (1) (i) is preventive detention for reason connected with the maintenance of public order."

So also, in the other two cases above referred to, the observations in question were not made in connection with the issue whether the rule of pith and substance could be invoked while deciding which of two or more entries in the same legislative list governed a particular case.

The rule of pith and substance as applied to an Act passed by the State Legislature, which in pith and substance falls within the State List and incidentally encroaches upon a matter in the Union List, is subject to an exception known as the doctrine of occupied field. For fuller discussion of this aspect, see NOTE 10.

The rule of pith and substance only means that in determining whether an Act falls within the jurisdiction of one Legislature rather than another, the Court must have regard to the true character and nature of the legislation.

The same principle underlies the doctrine which invalidates colourable legislation by insisting that what cannot be done directly cannot be done indirectly. But there is a distinction between the rule of pith and substance and the principle against colourable legislation although there is the above similarity between the two principles. As to colourable legislation, see NOTE 11.

See also ART. 254, NOTE 12.

10. Doctrine of occupied field. — It has been seen in NOTE 9 that where a law made by a State Legislature is in pith and substance within its jurisdiction and incidentally trenches on a matter in the Union List, such a law would be entirely *intra vires* the State Legislature. But there is an exception to this principle which is known as the doctrine of "occupied field". According to this principle, the validity of the State law in the above case as regards its incidental encroachment on matters in the Union List will depend on the non-existence of any Union law on such matter, that is, in other words, on the field being "unoccupied" by a Union law. If the field is "occupied" or subsequently becomes "occupied" by any Union law, the State law will become void to that extent.[1]

Article 246 — Note 10

[1] 1949 P C 190 (194) (Pr 19) [AIR V 36 C 56] (P C), *Attorney-General of Saskatchewan* v. *Attorney-General of Canada.* (In this case it was held that the

This doctrine of occupied field may be best stated in the words of Viscount Maugham in *Attorney-General of Alberta* v. *Attorney-General of Canada.*[2] In that case, while dealing with Ss. 91 and 92 of the British North America Act, 1867, his Lordship observed as follows:

> "Since the year 1894 it has been a settled proposition that if a subject of legislation by the Province is only incidental or ancillary to one of the classes of subjects enumerated in S. 91 (Dominion subjects) and is properly within one of the subjects enumerated in S. 92 (Provincial subjects), then legislation by the Province is competent unless and until the Dominion Parliament chooses to occupy the field by legislation: *Attorney-General of Ontario* v. *Attorney-General for Canada.*[3]"

The doctrine of "occupied field" applies only where there is a *clash* between a Union law and a State law. The doctrine does not mean that if there is a Union law on a particular subject the State cannot make any law on that subject at all. The doctrine only means

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provision in the Provincial Act regarding interest was not merely incidental encrochment but even otherwise, the Dominion had already occupied the field by enacting the Interest Act.)

1943 P C 76 (80) [AIR V 30] (P C), *Attorney-General of Alberta* v. *Attorney-General of Canada.* (Held that the Debt Adjustment Act, 1937, of the Province of Alberta obstructed and interfered with the actual legislation of the Parliament of Canada in relation to bankruptcy and insolvency : *Royal Bank of Canada* v. *Larue*, (1928) 1928 App Cas 187, *Rel. on.*)

1941 F C 47 (56, 58) [AIR V 28] (F C), *Subrahmanyan* v. *Muthuswami.* (Per Sulaiman, J.—Doctrine of pith and substance and incidental encroachment is subject to doctrine of occupied field.)

1944 Pat 303 (304) [AIR V 31] (FB), *Deo Nandan* v. *Ram Prasad.* (In interpreting S. 100, Government of India Act, 1935, if the pith and substance principle be applied the doctrine must be applied in its entirety and in its entirety it involves also the subsidiary principle of the occupied field. One Legislature may trespass incidentally into the field of another, but only if the field is vacant. It cannot in doing so oust a law of the superior Legislature which is already in possession.)

(1928) 1928 App Cas 187 (198, 199), *Royal Bank of Canada* v. *Larue.*

(1894) 1894 App Cas 189 (200, 201) : 63 L J P C 59, *Attorney-General of Ontario* v. *Attorney-General of Canada.* (Section 9 of the Revised Statutes of Ontario of 1887, c. 124, entitled "An Act respecting Assignment and Preferences by Insolvent Persons" is within the legislative powers conferred by S. 92, British North America Act, 1867. Though the enactment deals with matters incidental or ancillary to the main subject of Bankruptcy and Insolvency which is within the exclusive powers of the Dominion Parliament under S. 91, British North America Act, it is within the competence of the Provincial Legislature so long as it does not *conflict* with any existing bankruptcy legislation of the Dominion Parliament.)

[2] 1943 P C 76 (80) [AIR V 30] (P C).

[3] (1894) 1894 App Cas 189 : 63 L J P C 59.

that the State cannot make a law on that subject, which *conflicts* with the Union law.[4]

In *State* v. *Zaverbhai*,[5] Chagla, C. J., observed:

> "In my opinion it is correct that as far as our Constitution is concerned, the doctrine of 'occupied field' cannot be applied, if that doctrine means that if Parliament legislates on a particular subject and thereby occupies the field, the State Legislature is completely debarred from legislating on the same subject."

As pointed out above, the doctrine of occupied field does not mean that the State Legislature is debarred from legislating on a subject which has been legislated upon by the Parliament. This has been expressly made clear by Lord Macmillan delivering the judgment of the Privy Council in *Forbes* v. *Attorney-General of Manitoba*,[6] where he observed as follows:

> "The doctrine of the 'occupied field' applies only where there is a clash between Dominion legislation and Provincial legislation within an area common to both. Here there is no conflict. Both income taxes may co-exist and be enforced without clashing."

But where a Central law evinces an intention expressly or impliedly to cover the entire field, a Provincial law about the same subject would be repugnant to the Central law although both laws contain exactly similar provisions. (See ART. 254, NOTE 15.)

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[4] (1937) 1 All E R 249 (257) : 1937 App Cas 260, *Forbes* v. *Attorney-General of Manitoba*. (It was contended that Dominion Parliament by enacting general Dominion Income-tax Act, 1917, had already occupied the field so as to preclude Manitoba Legislature from enacting any income-tax legislation. It was held that there was no conflict between the two. Both income-taxes may co-exist.)

(1894) 1894 App Cas 189 (200, 201) : 63 L J P C 59, *Attorney-General of Ontario* v. *Attorney-General of Canada*. (Provincial law held to be *intra vires* so long as it does not *conflict* with any existing Dominion law.)

[*See* (1928) 1928 App Cas 187 (198, 199), *Royal Bank of Canada* v. *Larue*. ("No doubt it was within the competence of the Provincial Legislature to give to a judicial hypothec the quality of a real right; but if and so soon as that enactment comes into conflict with a Dominion statute duly passed under the authority of S. 91 of the Act of 1867, then the Dominion statute prevails over the Provincial legislation and takes effect according to its tenor. The decisions of the Board relating to what is sometimes called the 'unoccupied field' are referred to in the judgment of Newcombe, J., and conclusively establish this point.")]

[*See also* (1827) 6 Law Ed 606 : 12 Wheat 213, *Ogden* v. *Saunders*. (Power of U. S. Congress "to establish uniform laws on the subject of bankruptcies throughout the United States" does not exclude the right of the States to legislate on the same subject except when the power is actually exercised by Congress, and the State laws conflict with those of Congress.)]

[5] 1953 Bom 371 (382) (Pr 34) [AIR V 40 C 118] : I L R (1954) Bom 117 : 1953 Cri L Jour 1602 (D B).

[6] (1937) 1 All E R 249 (257) : 1937 App Cas 260.

Thus, the doctrine of 'occupied field' in effect only means what is enacted in ART. 254 regarding repugnancy of a State law to a Union law.

Does the doctrine of a 'occupied field' apply to a *Union* law incidentally encroaching on a matter in the State List? In other words, where a Union law falls in pith and substance within the Union List but incidentally encroaches on a matter in the State List and the provisions relating to the matter in the State List conflict with a State law on the same matter, will such provisions prevail as against the State law? Or will they have to yield to the State law on the 'principle of occupied field? The answer to this question is that the doctrine of 'occupied field' does not apply so as to give superior validity to a *State* law as against a Union law even though the provisions of the Union law relate to a matter in the State List. The doctrine of 'occupied field', according to the decisions, has only been applied for upholding *central* legislation as against provincial legislation when the latter has incidentally encroached on a central subject while dealing with a provincial subject.

But apart from this, ART. 254 also points to the same result. When under the doctrine of pith and substance and incidental encroachment Parliament gets competency to legislate on a matter in the State List, albeit "incidentally", such incidental provisions of the Parliamentary law are clearly provisions which Parliament is "competent to enact" within ART. 254, cl. (1), and hence are entitled to the benefit of that article.

With regard to a *State* law which falls in pith and substance within the State List and encroaches incidentally on a matter in the Union List, it has already been stated above that although such a State law is *intra vires* according to the rule of pith and substance, yet the rule is subject to the subsidiary doctrine of 'occupied field'. Under this doctrine, the State law in such a case will only be valid if and in so far as it does not clash with a Union law on a matter in the Union List on which the State law incidentally encroaches. This is also the result of ART. 254, cl. (1), because *ex hypothesi* the matter encroached upon by the State law in such a case is one in the Union List and as such one upon which the Union Legislature is "competent to legislate". Hence, under ART. 254, cl. (1), any provision of law which Parliament makes on such a subject is entitled to prevail against any provision of law which a State Legislature may make or may have made incidentally while legislating on a matter in the State List.

It will be seen from the above discussion that in addition to the matters enumerated in the Concurrent List the doctrine of pith and substance and incidental encroachment operates to create concurrent fields of legislative power between the Union and State Legislatures. The provisions of ART. 254 apply not only to matters in the Concurrent List but also to such additional fields of concurrent legislative power which come into existence as a result of the operation of the doctrine of pith and substance and incidental encroachment.

The principle involved in the doctrine of 'occupied field' is thus, as already stated, in effect, the same as the principle enacted in ART. 254, cl. (1). That principle is based on repugnancy between a Union law and a State law and enacts that in case of such repugnancy the State law shall "to the extent of the repugnancy" be void. Thus, the question involved is not about the competency of the State Legislature to enact *any* law on a particular subject but its competency to enact a law which conflicts with or is repugnant to a Union law on the same subject. Thus, the superior efficacy of the Union law in such a case is not due to the fact that the Union Legislature has, and the State Legislature has not, the power to legislate on the subject. In other words, the principle of 'occupied field' which accords to a Union law superior efficacy over a State law dealing with the same subject is different from the principle of *priority* of the legislative power of the Union over that of the State Legislature in a matter which, in pith and substance, falls both in the Union and State Lists. As seen in NOTE 6, the principle of priority means that the Parliament has *exclusive* power of legislation over a matter which falls both in the Union and the State Lists. But the principle of 'occupied field' means that both the Union and the State Legislatures have a concurrent field of operation but only that in case of actual conflict between a Union law and a State law, the former is to prevail. (See also ART. 254 and commentary thereon especially NOTES 12 and 15.)

(a) "Colourable legislation"—Meaning.

11. Colourable legislation. — 'Colourable legislation' simply means legislation which, while transgressing constitutional limitations in actuality, is made to appear as if it were quite constitutional.[1]

Article 246 — Note 11

[1] 1953 S C 375 (379) (Pr 9) [AIR V 40 C 85] : 1954 S C R 1 : I L R (1954) Cut 351 (S C), *K. C. Gajapati Narayan Deo* v. *State of Orissa*.

1952 S C 252 (276, 277) (Prs. 59, 61) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : I L R 31 Pat 565 (S C), *State of Bihar* v. *Kameshwar Singh*. (Legislation ostensibly under one or other of the powers conferred by the Constitution, but in truth and fact not falling within the content of that power is merely *colourably constitutional*, but is really not so. Bihar Land Reforms Act is not a fraud on the Constitution except S. 23 (f) enacted under the power conferred by Entry 42 of List III which is colourable exercise of legislative power and is unconstitutional on that ground.)

1955 Pat 1 (11) [(S) AIR V 42 C 1] : I L R 33 Pat 690 (S B), *Brij Bhukan* v. *S. D. O., Siwan*. (If a statute enacted ostensibly for removal and prevention of

Thus, there are two elements present in what is known as 'colourable legislation': (i) that looking at the real nature of the legislation it violates the Constitution; (ii) that this violation is done in an indirect and covert fashion by *appearing* to comply with the constitutional requirements. Thus, it is not the mere indirectness of the legislation or the fact that it pretends to be something which it is not, that stamps it with the character of colourable legislation. It is the combination of the two elements of indirectness and infringement of constitutional provisions that constitutes colourable legislation.

In *K. C. Gajapati Narayan Deo* v. *State of Orissa*,[2] the Supreme Court observed as follows :

> "If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of Fundamental Rights, questions do arise as to whether the Legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect, and it is to this latter class of cases that the expression 'colourable legislation' has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a Legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise.[3]"

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encroachment on property has little or very unsubstantial relation to those subjects, and is a palpable invasion of fundamental rights, it must be declared *ultra vires* to that extent.)

(1937) 3 All E R 598 (601) : 1937 App Cas 863, *Gallagher* v. *Lynn*.

[2] 1953 S C 375 (379) (Pr 9) [AIR V 40 C 85] : 1954 S C R 1 : I L R (1954) Cut 351 (S C).

[3] *See also* 1952 S C 252 (292) (Pr 108) [AIR V 39]: 1952 S C R 889, 1020 & 1056 : I L R 31 Pat 565 (S C), *State of Bihar* v. *Kameshwar Singh*. (Per *Das, J.*—The failure to comply with the constitutional condition for the exercise of legislative power may be overt or it may be covert. When it is overt, we say the law is obviously bad for non-compliance with the requirements of the Constitution, that is to say, the law is '*ultra vires*.' When, however, the non-compliance is covert, we say that it is a fraud on the Constitution, the fraud complained of being that the Legislature pretends to act within its power while in fact it is not so doing.)

1954 Hyd 50 (52) (Pr 9) [AIR V 41 C 20] : I L R (1954) Hyd 76 (DB), *Firm Soma Rajaiah* v. *S. T. Officer*. (A I R 1953 S C 375 (SC), *Quoted.*)

(b) In considering constitutionality of statute, Court to have regard to its real nature.

Thus, in considering the validity of a legislation the Court must have regard to the real character of the legislation and not merely to the form in which it is clothed.[4] (See also NOTE 9). In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the legislative powers of the particular Legislature to legislate upon, the form in which the law is clothed would not save it from condemnation.[5] The principle is that what

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4. 1954 S C 119 (123) (Pr 8) [AIR V 41 C 26] : 1954 S C R 674 (S C), *Dwarkadas* v. *Sholapur Spinning & Weaving Co.*

1931 P C 94 (96) [AIR V 18] : 32 Cri L Jour 899 (P C), *Propriatary Articles Trade Association* v. *Att.-Gen. of Canada*, (One of the questions to be considered is always whether in substance the legislation falls within an enumerated class of subjects or whether on the contrary it is an encroachment on an excluded class.)

1939 F C 1 (7) [A I R V 26] (F C), *In re C. P. Motor Spirit Act.* (*Gwyer C. J.*— Courts are entitled to look at the real substance of the Act (imposing a tax), at what it dces, and not merely at what it says, in order to ascertain the true nature of the tax—C. P. and Berar Sales of Motor Spirit and Lubricants Taxation Act—Validity—Whether the tax is *really* sales tax or excise duty should be considered)

1955 Hyd 41 (42) (Pr 4) [(S) AIR V 42 C 11] : I L R (1954) Hyd 640 (DB), *Kodarap Laxmiah* v. *Hyderabad State.*

1954 All 728 (734) [AIR V 41 C 289] : ILR (1954) 2 All 191 : 1954 Cri L Jour 1485 (DB), *Durgeshwar* v. *Secretary Bar Council.* (State Legislature cannot by professing to adopt, with modifications, an Act passed by another Legislature, legislate on a matter which is not covered by List II or List III.)

[*See* 1953 S C 375 (384) (Pr 28) [AIR V 40 C 85]: 1954 S C R 1 : ILR (1954) Cut 351 (SC), *K. C. Gajapati Narayan Deo* v. *State of Orissa.* (Section 37, Orissa Estates Abolition Act (1 of 1952), contains the legislative provision regarding the form and the manner in which the compensation for acquired properties is to be given and as such it comes within clear language of Entry 42 of List III, Schedule VII of the Constitution. It is not a legislation on something which is non-existent or unrelated to facts. It cannot also be seriously contended that what S. 37 provides for is not the giving of compensation but of negativing the right to compensation. The validity of this provision cannot be challenged on the ground that it is a piece of colourable legislation.)

1945 P C 98 (101, 102) [AIR V 32] : 72 Ind App 91 : 1945 F C R 179 : ILR (1945) Kar (PC) 153 (PC), *Governor-General in Council* v. *Madras Province.* (Madras General Sales Tax Act, 9 of 1939—Tax imposed by the Act is not a duty of excise in the cloak of a tax on sales—Lacking the characteristic features of a duty of excise such as uniformity of incidence and discrimination in subject matter, it is in its general scope and in its detailed provisions a tax on sales.)

1937 P C 91 (92, 93) [AIR V 24] (PC), *Attorney-General of British Columbia* v. *Attorney-General of Canada.* (Section 498A, Criminal Procedure Code introduced by S. 9 of 25 & 26 Geo. V, C 56 is not *ultra vires* of the Parliament of Canada as there is no reason for supposing that the Dominion is using the criminal law as a pretence or pretext or that the Legislature is in pith and substance only interfering with civil rights in the Province. AIR 1931 P C 94 (PC), *Rel. on.*)]

5. 1953 S C 375 (379) [AIR V 40 C 85] : 1954 S C R 1 : ILR (1954) Cut 351 (SC), *K. C. Gajapati Narayan Deo* v. *State of Orissa.*

cannot be done directly cannot be done indirectly.[6] As Lord Halsbury

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1949 PC 190 (193) (Pr 14) [AIR V 36 C 56] (PC), *Attorney-General of Saskatchewan* v. *Attorney-General of Canada.* (If under colour of arrangement which purports to deal only with principal ot a debt it is really the contractual obligation to pay interest on principal which is modified, the enactment (Provincial) should be regarded as dealing with interest which is exclusive Dominion subject under British North America Act, S. 91.)

1939 P C 53 (56, 57) [AIR V 26] (PC), *Att. Gen. of Alberta* v. *Att. Gen of Canada.* (British North America Act, 1867, Ss. 91 and 92—It is not competent either for the Dominion or a Province under the guise or the pretence or in the form of an exercise of its own powers to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other : *Att. Gen. for Ontario* v. *Reciprocal Insurers,* (1924) 1924 App Cas 328 and *In re Insurance Act of Canada,* (1932) 1932 App Cas 41, *Rel. on* —The Bill No. 1, entitled "an Act respecting the Taxations of Banks" enacted by the Province of Alberta instead of being in any true sense taxation in order to the raising of a revenue for Provincial purposes, is merely part of a legislative plan to prevent the operation within the Province of those banking institutions which have been called into existence and given the necessary powers to conduct their business by the only proper authority, the Parliament of Canada. This is a sufficient ground for holding that the Bill is *ultra vires* : *Bank of Toranto* v. *Lambe,* (1887) 12 App Cas 575, *Expl.*)

1921 P C 148 (160) [AIR V 8] (PC), *Great West Saddlery Co.* v. *King.* (It would be requisite to see that the Provincial Legislature was not, under the guise of imposing direct taxation which is within their power really doing something else, such as imposing indirect taxation.)

1939 P C 1 (31) [AIR V 26] (PC), *In re C. P. Motor Spirit Act.* (Where there is an absolute jurisdiction vested in a Legislature the laws promulgated by it must take effect according to the proper construction of the language in which they are expressed. But where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness, the substance of the legislation, for the purpose of determining what it is that the Legislature is really doing)

(1924) 1924 App Cas 328 (337) : 93 L J P C 137, *Attorney-General for Ontario* v. *Reciprocal Insurers.* (Duff J.—"Where the law-making authority is of a limited or qualified character it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the Legislature is really doing.")

(1878) 3 App Cas 1090 (1098) : 38 L T 897, *Att. Gen. for Quebec* v. *Queen Ins. Co.* (The clauses of Quebec Act 39 Vict. (passed by the Legislature of Quebec) which impose tax upon certain policies of assurance and certain receipts or renewals are not authorized by the British North America Act, S. 92, sub-ss. 2 & 9, as it is not a direct taxation.)

[6] 1953 S C 375 (381) [AIR V 40 C 85] : 1954 S C R 1 : ILR (1954) Cut 351 (SC), *K. C. Gajapati Narayan Deo* v. *State of Orissa.* (The whole doctrine of colourable legislation is based upon the maxim that you cannot do indirectly what you cannot do directly.)

1949 P C 190 (193) [AIR V 36 C 56] (PC), *Attorney-General of Saskatchewan* v. *Attorney-General of Canada.*

1955 NUC (Eng) 5433 [AIR V 42] : (1955) 2 All E R 833 (837), *Govindan Sellappah* v. *Punchi Banda.*

1954 All 728 (734) [AIR V 41 C 289] : ILR (1954) 2 All 191 : 1954 Cri L Jour 1485 (DB), *Durgeshwar* v. *Secretary, Bar Council.*

put it in *Madden* v. *Nelson and Fort Shephard Railway Co.*,[7] "you cannot do that indirectly which you are prohibited from doing directly."

In *Deputy Federal Commissioner of Taxation (N. S. W.)* v. *W. R. Moran Proprietary Ltd.*,[8] it was observed as follows :

> "Where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the Legislature is really doing. In such cases, the Court is not to be over-persuaded by the appearance of the challenged legislation. . . . In that case, this Court applied the well-known principle that in relation to constitutional prohibitions binding a Legislature, that Legislature cannot disobey the prohibi-

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(1901) 45 Law Ed 862 (867): 181 U S 283 (294, 295), *Fairbanks* v. *United States.* (What cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result: *Woodruff* v. *Parham*, (1869) 19 Law Ed 382 : 8 Wall 123, *Brown* v. *The State of Maryland*, (1827) 6 Law Ed 678 : 12 Wheat 419, *Ref.* — The freedom of exportation being guaranteed by the American Constitution, it cannot be disturbed by any form of legislation which burdens that exportation. The form in which the burden is imposed cannot vary the substance.)

(1879) 25 Law Ed 743 (746) : 100 U S 434, *Guy* v. *Baltimore.* (An ordinance of the City of Baltimore, authorised by a statute of Maryland and in pursuance of which vessels landing at the public wharves of the city, laden with the products of other States were required to pay wharfage fees which were not exacted from vessels landing thereat with the products of Maryland was declared to be in conflict with the National Constitution—Such fees although denominated wharfage dues, cannot be regarded as compensation merely for use of the city's property, but as a mere expedient or device to accomplish, by indirection, what the State could not accomplish by a direct tax, viz. build up its domestic commerce by means of unequal and oppressive burdens upon the business and industry of other States.)

[*See* 1942 F C 27 (30, 31) [AIR V 29] (FC), *Megh Raj* v. *Allah Rakhia.* (If it should be found that the substantive provisions of an impugned Act are to any extent void or inoperative, any attempt to exclude attack on them by barring the jurisdiction of Civil Courts will be open to criticism as "an attempt to do by indirect means" something which the Provincial Legislature was not entitled to do.)

1943 Cal 489 (505) [AIR V 30] (SB), *Sushil Kumar* v. *Emperor.* (A non-sovereign Legislature which has made a law which is *ultra vires* of itself cannot by a subsequent Act declare such law or any part thereof to be *intra vires.* To permit this would be to permit a Legislature with powers limited by some other authority to enlarge its powers by its own act without reference to the authority creating it. Now if this cannot be done directly, obviously it cannot be done indirectly by means of drafting or other devices : *Madden* v. *Nelson and Fort Sheppard Railway*, (1899) 1899 App Cas 626 and *Board of Trustees of Lethbridge Irrigation District* v. *Independent order of Foresters*, (1940) 1940 App Cas 513, *Rel. on.*)]

[7] (1899) 1899 App Cas 626 (628) : 68 L J P C 148.

[8] 61 C L R 735 (793). (Quoted by Mahajan J. in AIR 1952 S C 252 (276) (SC).)

tion merely by employing an indirect method of achieving exactly the same result. . . . The same issue may be whether legislation which at first sight appears to conform to constitutional requirements is colourable or disguised. In such cases, the Court may have to look behind names, forms and appearances to determine whether or not the legislation is colourable or disguised.''

In *Dwarkadas Shrinivas* v. *Sholapur Spinning and Weaving Co.*,[8a] Mahajan J. observed as follows:

> "In order to decide these issues (as to whether the impugned law infringed the Fundamental Rights) it is necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the Legislature has really done; the Court, when such questions arise, is not over-persuaded by the mere appearance of the legislation. In relation to constitutional prohibitions binding a Legislature it is clear that the Legislature cannot disobey the prohibitions merely by employing an indirect method of achieving exactly the same result. Therefore, in all such cases the Court has to look behind the names, forms and appearances to discover the true character and nature of the legislation.''

(c) Mere indirectness is immaterial if Legislature otherwise is competent.

It has been already mentioned that the mere fact that the legislation adopts an indirect method to accomplish a certain object will not make it colourable legislation. So long as the object which is sought to be achieved by indirect means is constitutionally within the competence of the Legislature, the mere fact that the legislation adopts an indirect method will not make a piece of legislation 'colourable.'[9] In *K. C. Gajapati Narayan Deo* v. *State of Orissa*,[10] the Supreme Court observed as follows:

> "The contention of Mr. Narasaraju really is that though apparently it purported to be a taxation statute coming under Entry 46, LIST 2 (Taxes on agricultural income), really and in substance it was not so. It was introduced under the guise of a taxation statute with a view to accomplish an ulterior purpose, namely, to inflate the deductions for the purpose of valuing an estate so that the compensation payable in respect of it might be as small as possible. Assuming that it is so, still it cannot be regarded as a colourable legislation in accordance with the principles indicated above, unless the ulterior purpose, which it is intended to serve, is something which lies beyond the powers of

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[8a] 1954 S C 119 (123) (Pr 8) [AIR V 41 C 26] : 1954 S C R 674 (S C).

[9] 1953 S C 375 (379) [AIR V 40 C 85] : 1954 S C R 1 : ILR (1954) Cut 351 (SC), *K. C. Gajapati Narayan Deo* v. *State of Orissa*.

[10] 1953 S C 375 (381) (Prs 17, 18) [AIR V 40 C 85] : 1954 S C R 1 : ILR (1954) Cut 351 (SC). (Orissa Agricultural Income-tax (Amendment) Act, 1950, is not a colourable legislation.)

> the Legislature to legislate upon. The whole doctrine of colourable legislation is based upon the maxim that you cannot do indirectly what you cannot do directly. If a Legislature is competent to do a thing directly, then the mere fact that it attempted to do it in an indirect or disguised manner cannot make the Act invalid. Under Entry 42, LIST 3, which is a mere head of legislative power, the Legislature can adopt any principle of compensation in respect to properties compulsorily acquired. Whether the deductions are large or small, inflated or deflated, they do not affect the constitutionality of a legislation under this entry……It may appear on scrutiny that the real purpose of a legislation is different from what appears on the face of it, but it would be a colourable legislation only if it is shown that the real object is not attainable by it by reason of any constitutional limitation or that it lies within the exclusive field of another Legislature."

(d) Motive of Legislature immaterial except indirectly.

From the above it is clear that the question of the motives of the Legislature is really immaterial where there is no lack of competence on the part of the Legislature.[11] Again, to quote the Supreme Court in *K. C. Gajpati Narayan Deo* v. *State of Orissa*:[12]

> "It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of *bona fides* or *mala fides* on the part of the Legislature. The whole doctrine resolves itself into the question of competency of a particular Legislature to enact a particular law. If the Legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the Legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power: *vide* Cooley's CONSTITUTIONAL LIMITATIONS, Vol. 1, page 379.[13]"

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11. 1953 Orissa 185 (221) (Pr 82) [A I R V 40 C 61] : I L R (1953) Cut 71 (DB), *K. C. Gajapati Narayan Deo* v. *State of Orissa.* (If the primary purpose of the statute is to raise revenue for the purpose of the State, collateral purposes or motives of a Legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial enquiry. But if the taxing statute is so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power but constitutes in substance and effect the direct exertion of a different and forbidden power, as for example, the confiscation of property, it may be held to be invalid: *McCray* v. *United States,* (1904) 49 Law Ed 78 : 195 U S 27 and *Norwood* v. *Baker*, (1898) 43 Law Ed 443 : 172 U S 269, *Foll.*)

12. 1953 S C 375 (379) (Pr 9) [AIR V 40 C 85]: 1954 S C R 1: ILR (1954) Cut 351 (SC).

13. *See also* 1954 Hyd 50 (52) (Prs 9, 10) [AIR V 41 C 20] : I L R (1954) Hyd 76 (DB), *Firm of Soma Rajaian* v. *Sales Tax Officer, Secunderabad.* (It was contended that the enactment of a statute taxing specific commodity immediately before the enforcement of a Parliamentary Act declaring them essential

But the above only means that the question of motive has no *direct* relevance to the constitutional validity of a statute. But in determining whether an impugned statute is *intra vires* or *ultra vires* the court has to consider the *real nature* of the statute. One of the factors to be considered by the Court in this connection is clearly whether the impugned legislation is an attempt on the part of the Legislature to achieve by indirect means what it cannot accomplish directly, that is, to veil in a constitutional form what in truth and substance is unconstitutional. Thus, the question of the motive of the Legislature becomes relevant in connection with the question as to the real character of an impugned legislation. In other words, the question has an *indirect bearing* on the question of the constitutional validity of a legislative enactment. This has been recognised by the Supreme Court itself in the above case where, immediately after mentioning that motive is irrelevant on the question of vires, the Supreme Court proceeds to point out that the Legislature cannot violate the constitutional prohibitions by employing an indirect method.[14]

(e) Burden of proof and matters to be considered.

The allegation that a certain enactment is colourable legislation must be strictly proved.[15] The maxim *omnia præsumuntur rite esse acta* is at least as applicable to an act of a legislature as to any other official act, and the Court will not be astute to attribute

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for the life of the community is a colourable exercise of a legislative power—Contention rejected: AIR 1953 S C 375 (SC), *Foll.*)]

1953 Orissa 185 (211, 214) (Prs 61, 65) [AIR V 40 C 61] : I L R (1953) Cut 71 (DB), *K. C. Gajapati Narayan Deo* v. *State of Orissa*. (It is well settled that what may be called the mere object or motive of a legislative measure is not, by itself, an invalidating circumstance. It is not the purpose of a statutory enactment, but the constitutional effect and operation of the enactment which determines its validity. In judging the validity of a legislative scheme, what is material to be considered is the purpose or object or the effect in the sense of the function of the impugned legislative provision, that is to say, the operation of the Act, and not the purpose or the effect or the object in the sense of motive: 76 Com W L R 1 (186, 187), *W. R. Moran Proprietary Ltd.* v. *Deputy Commr. of Taxation for N. S. W.*, (1940) 1940 App Cas 838 : 109 L J P C 85, *Ref.* (Confirmed in appeal in AIR 1953 S C 375 (SC)).)

[14] 1953 S C 375 (379) [AIR V 40 C 85]: 1954 S C R 1: ILR (1954) Cut 351 (SC), *K. C. Gajapati Narayan Deo* v. *State of Orissa.*

[15] 1955 NUC (Eng) 5433 [AIR V 42]: 1955-2 All E R 833, *Govindan Sellappah* v. *Punchi Banda.*

[*See also* 1953 Orissa 185 (211) (Pr 60) [AIR V 40 C 61] : ILR (1953) Cut 71 (DB), *K. C. Gajapati Narayan Deo* v. *State of Orissa*. (Where the *bona fides* of a Legislature as such and not of any individual are involved, the absence of *bona fides* and the presence of a positive intention which is said to have a relevance on the validity of the legislative enactments is not a matter that can be decided on mere balance of probabilities. The *mala fides* so alleged must be strictly proved to the hilt and beyond any reasonable doubt. Like an accused in a criminal case the State should get the benefit of doubt.)]

to any Legislature motives or purposes or objects which are beyond its powers. It must be shown affirmatively by the party challenging a statute, which is upon its face *intra vires*, that it was enacted as part of a plan to effect indirectly something which the Legislature had no power to achieve directly.[16] See also ART. 245, NOTE 16.

The legislative history of an enactment may be considered while determining whether in the guise of a legislation which is within the powers of the Legislature it really trespasses the limits of such powers.[17]

In *Proprietary Articles Trade Association* v. *Attorney-General of Canada*,[18] Lord Atkin observed as follows:

> "Their Lordships entertain no doubt that time alone will not validate an Act, which, when challenged, is found to be *ultra vires*: nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment. But one of the questions to be considered is always whether in substance the legislation falls within an enumerated class of subject, or whether on the contrary in the guise of an enumerated class it is an encroachment on an excluded class. On this issue the legislative history may have evidential value."

Reports of the proceedings of the Legislature during the passage of impugned statutes are admissible as public documents under S. 78 (2) of the Evidence Act. Where the *bona fides* of a piece of legislation are questioned, speeches of members of the Government, who are responsible for the passage of the bill through the Legislature, may have some value especially as regards legislative history

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16. 1955 NUC (Eng.) 5433 [AIR V 42] : (1955) 2 All E R 833 (837), *Govindan Sellappah* v. *Punchi Banda.*

[*See also* 1953 Orissa 185 (213) (Pr 65) [AIR V 40 C 61] : ILR (1953) Cut 71 (DB), *K. C. Gajapati Narayan Deo* v. *State of Orissa.* (Per *Jagannadhadas C. J.* — "While it is clear that the principle of invalidity of a legislative measure as the result of a colourable legislative scheme must now be taken as well established, caution is required in the application thereof and I venture to think that American decisions in this behalf cannot always be relied on as a sure and infallible guidance.")]

17. 1931 P C 94 (96) [AIR V 18] : 32 Cri L Jour 899 (PC), *Proprietary Articles Trade Association* v. *Attorney-General of Canada.*

[*See* 1953 Nag 40 (51) (Pr 52) [AIR V 40 C 22] : ILR (1952) Nag 736 (DB), *Bhaskar* v. *Mohd. Alimulla Khan.* (It was contended that in considering validity of Berar Tenancy Law (Amendment) Act (19 of 1950), provisions of Act, 18 of 1950, and Act 1 of 1951, should be taken into consideration—Repelling this contention it was held that validity of law has to be considered with reference to its provisions and provisions of Constitution and nothing else.)]

18. 1931 P C 94 (96) [AIR V 18] : 32 Cri L Jour 899 (PC).

leading up to the measure in question and its close connection with other contemporary pieces of legislation.[19]

(f) Rule of pith and substance distinguished.

Where an Act passed by a Legislature seems to fall within the legislative field of the particular Legislature as well as that of another Legislature, the Court has to look at pith and substance of the Act and consider whether the true subject-matter of the Act falls within the jurisdiction of the particular Legislature which has passed it or within that of another Legislature. Where the Act in pith and substance falls outside the jurisdiction of the Legislature by which it has been passed although incidentally it touches upon certain matters within the jurisdiction of such Legislature, the Act would be *ultra vires*. It is not necessary in such a case that in order to hold the Act to be *ultra vires* it must be a colourable piece of legislation.[20] In other words, in order to establish the unconstitutionality of such an Act it is not necessary to show that the Legislature attempted to disguise the fact that it was legislating on subjects beyond its powers. No doubt, if the Legislature did attempt to do so, the Act would be a colourable piece of legislation. But the unconstitutionality of the Act will be due to the fact that the Legislature was actually acting beyond its competence and not to the fact that the Legislature was trying to disguise the real nature of the Act. Thus, colourable legislation is only one form of legislation which is beyond the competence of the Legislature which has passed it. Or, in other words, legislation, which transgresses the constitutional limits and is therefore *ultra vires*, takes on the additional character of colourable legislation under certain circumstances. Although this is so and although also the object of both the rule of pith and substance and the doctrine of colourable legislation is the same, namely, that the Court must have regard to the real nature and character of a piece of legislation in determining its constitutional validity, yet the two principles are not identical, inasmuch as there is no element of disguise necessarily involved in legislation which is condemned as unconstitutional by the application of the rule of pith and substance, while such an element is necessarily involved in legislation condemned as colourable legislation.

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[19] 1953 Orissa 185 (222) (Pr 86) [AIR V 40 C 61] : ILR (1953) Cut 71 (DB), *K. C. Gajapati Narayan Deo* v. *State of Orissa*.

[20] *See* 1937 P C 89 (91) [AIR V 24] (PC), *Att. Gen. of Canada* v. *Att. Gen. of Ontario*. (British North America Act, 1867, Ss. 91 and 92 — The Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province or encroach upon the classes of subjects which are reserved to provincial competence. It is not necessary that it should be a colourable device or a pretence. If on the true view of the legislation it is found that in reality and in pith and substance the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid.)

12. Legislative practice. — In interpreting the provisions of the Constitution as regards the powers of the Legislature long continued legislative practice can be taken into consideration when the meaning of the provisions is not clear and admits of more than one view being taken of the powers of the Legislature. A question raised may be as to the subject-matter on which a particular Legislature is competent to legislate or it may relate to the manner in which the legislative power can be exercised as, for instance, whether any part of the power can be delegated to the Executive. (See ART. 245, NOTE 8.) This principle about the relevance of legislative practice as an aid to the interpretation of the Constitution in relation to the powers of the Legislatures and the validity of legislation has been recognized in a number of decisions.[1] In *Croft* v.

Article 246 — Note 12

[1] 1955 S C 58 (61) (Pr 6) [(S) A I R V 42 C 14]: 1955 S C R 829 (SC), *Navinchandra* v. *Commr. of I. T., Bombay.* (Reference to legislative practice may be admissible for cutting down the meaning of a word in order to reconcile two conflicting provisions in two legislative lists (AIR 1939 F C 1 (FC)) or to enlarge their ordinary meaning (A I R 1951 S C 318 (S C)).)

1951 S C 69 (77) (Pr 29) [AIR V 38 C 10]: 1951 S C R 51 (74) (SC), *State of Bombay* v. *Narottamdas.* (In this case legislative practice before Government of India Act, 1935, was relied on for interpreting the scope of List II, Entries 1 and 2 in Sch. VII of Government of India Act, 1935, and it was held that it had long been the practice in this country to constitute and organise Courts with general jurisdiction over all persons or matters subject only to certain pecuniary and territorial limitations and to confer special jurisdiction limited to certain specified cases or matters either on the ordinary Courts in addition to their general jurisdiction or on tribunals set up to deal with such matters exclusively—So, it was held that a distinction might be made between the two kinds of jurisdictions and the Provincial Legislature might be held to have power to vest general jurisdiction in addition to special jurisdiction regarding matters in Provincial List and Central Legislature had power regarding special jurisdiction in regard to matters in Central List.)

1948 P C 118 (120) (Pr 15) [A I R V 35 C 34]: 75 Ind App 86: 1948 F C R 1 (PC), *Wallace Brothers & Co. Ltd.* v. *I. T. Commissioner, Bombay.* (Where Parliament has conferred a power to legislate on a particular topic it is permissible and important in determining the scope and meaning of the power to have regard to what is ordinarily treated as embraced within that topic in the legislative practice of the United Kingdom: AI R 1933 P C 16 (P C), *Rel. on.* The point of the reference is emphatically not to seek a pattern to which a due exercise of the power must conform. The object is to ascertain the general conception involved in the words used in the enabling Act. On this view it was held that the concept of income-tax in the United Kingdom was that income-tax may be levied on a person if there is sufficient territorial connection between the taxing country and such person—Foreign company deriving the larger part of its income from British India — There is sufficient territorial connection for taxing such company.)

1933 P C 16 (18) [A I R V 20] (P C), *Croft* v. *Dunphy.*

1930 P C 120 (121) [AIR V 17] (P C), *Henrietta* v. *Attorney-General.* (In coming to a determination *as to the meaning* of a particular word in a particular Act of Parliament it is permissible to consider two points, viz.: (i) The external evidence derived from extraneous circumstances such as previous legislation decided cases; (ii) the internal evidence derived from the Act itself.)

1945 F C 9 (12) [A I R V 32] : 1945 F C R 65 : I L R (1945) Kar (F C) 88 (F C), *Wallace Brothers & Co. Ltd.* v. *Commr. of I.-T. Bombay, Sind and Baluchistan.* (Interpretation of Parliamentary enactment relating to constitution of subordinate Legislature — Expression in such enactment may carry the connotation which by well-established usage it has acquired in English law or politics. But the observations in AIR 1933 P C 16 (FC) cannot be interpreted as implying that the Indian Legislature must frame income-tax legislation on the same lines or on the same bases as have been adopted or found convenient in England.)

1941 F C 47 (55) [A I R V 28] (FC), *Subrahmanyan Chettiar* v. *Muttuswami.* (Per *Sulaiman J.*—Legislative practice in India prior to Government of India Act, 1935, shows that in the various Provinces there were existing legislations for relief from high rates of interest. So Madras Agriculturists' Relief Act, 4 of 1938, is not outside the province of the Madras Legislature.)

1939 F C 1 (12, 37) [AIR V 26] (FC), *In re C. P. Motor Spirit Act.* (Per *Gwyer C. J.* (*Jayakar J.* dubitante).—In interpreting the expression "duties of excise" in the Government of India Act, 1935, Sch. VII, List I, Entry 45, the Court is entitled to look at the manner in which Indian legislation preceding the Constitution Act, had been accustomed to provide for the collection of excise duties ; for Parliament must surely be presumed to have had Indian legislative practice in mind and, unless the context otherwise clearly requires, not to have conferred a legislative power, intended to be interpreted in a sense not understood by those to whom the Act was to apply.)

('79) ILR 4 Cal 172 (182) : 5 Ind App 178 (195) (PC), *Empress* v. *Burah.*

1949 Mad 481 (485) (Pr 6) [A I R V 36 C 220] : I L R (1949) Mad 739 : 50 Cri L Jour 684 (FB), *In re S. M. Nathaniel.* (Legislative practice can be utilised as a useful guide in the interpretation of the descriptive terminology adopted in the Constitution Act and particularly in the Lists in Sch. VII—Provisions as to appeals have always found a place in the "Codes of Procedure.")

1940 Bom 65 (68) [A I R V 27] (FB), *Sir Byramjee* v. *Province of Bombay.* (In construing the Government of India Act, 1935, the Court is entitled to look to the legislative practice prevailing in England and in India at the time when it was passed.)

1946 Bom 216 (239) [A I R V 33 C 59] : I L R (1946) Bom 517, *Tan Bug Taim* v. *Collector of Bombay.* (While construing the provisions of the Government of India Act, the Court is entitled to look to the legislative practice prevailing in England as well as in India at the time of the passing of the Act—A I R 1940 Bom 65 (FB), *Rel. on* — Power for compulsory acquisition does not include power to requisition land.)

1954 Bom 188 (193) (Pr 14) [AIR V 41 C 51]:ILR (1954) Bom 41 (DB), *Municipal Corporation* v. *Gordhandas.* (It is well established that in interpreting items in the lists in Sch. VII to the Government of India Act, it is open to the Courts to consider legislative history in order to give proper meaning to the words used in the items—List II Entry 42—Taking legislative practice into conisderation the power to adopt the basis of capital valuation in levying taxes on certain kinds of property cannot be said to be excluded from this entry—The adoption of this method or basis does not alter the character of the tax so as to make it a tax on capital value of assets under List I, Entry 55.)

1952 Bom 261 (263, 266, 271, 272) [A I R V 39] : I L R (1953) Bom 446 (DB), *J. N. Duggan* v. *Income-tax Commissioners, Bombay City.* (*Chagla C. J.*—Interpretation of entries in legislative lists must be consistent with and in conformity with legislative practice and not opposed to it — Even if the effect

Dunphy,[2] Lord Macmillan observed as follows :

> "When a power is conferred to legislate on a particular topic, it is important in determining the scope of the power to have regard to what is ordinarily treated as embraced within that topic in legislative practice, and particularly in the legislative practice of the State which has conferred the power."

In *State of Bombay* v. *Narottamdas*,[3] Patanjali Sastri J. of the Supreme Court observed as follows :

> "That it is legitimate to have regard to the legislative practice in determining the scope of legislative power has been recognized in decisions of high authority . . . . e. g. *Croft* v. *Dunphy*."[4]

In *Empress* v. *Burah*,[5] the Privy Council observed as follows :

> "When plenary powers of legislation exist as to particular subjects, whether in an Imperial or Provincial Legislature, they may be well exercised either absolutely or conditionally. Legislation conditional on the use of particular powers or on the exercise of a limited discretion entrusted by the Legislature to persons in whom it places confidence is not uncommon, and, in many circumstances, may be highly convenient. It cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred. It certainly used no words to exclude it."

In *M'Culloch* v. *The State of Maryland*,[6] Chief Justice Marshall

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of applying this principle would be to restrict the scope of an expression the principle should be applied—"Income" in Government of India Act, 1935, Sch. VII, List I, Entry 54 does not include "capital gains" because it is against legislative practice—*Tendolkar J.* contra — Where the language used in a legislative entry is plain and unambiguous widest possible import must be given to it. Parliamentary practice should not be resorted to for restricting the scope of the plain words appearing in a legislative entry.

The Income-tax and Excess Profits Tax (Amendment) Act, 22 of 1947, is not *ultra vires* the Central Legislature—But according to *Chagla C. J.* it falls under Government of India Act, 1935, Sch. VII, List I, Entry 55 while according to *Tendolkar J.* it falls under List I, Entry 54.)

1950 Bom 221 (225) (Pr 7) [A I R V 37 C 60] : ILR (1950) Bom 290 : 51 Cri L Jour 1207 (DB), *Kishori Shetty* v. *Emperor*. (In interpreting the Constitution Act the Court must attach importance to the legislative practice because very often a Constitution Act embodies a great deal of practice with regard to a particular legislation which has been built up in a country in the past.)

(1819) 4 Law Ed 579 (600) : 4 Wheat 316 (401), *M'Culloch* v. *The State of Maryland*.

2. 1933 P C 16 (19) [AIR V 20] (PC).
3. 1951 S C 69 (77) (Pr 20) [A I R V 38 C 10] : 1951 S C R 51 (SC).
4. 1933 P C 16 (19) [AIR V 20] (PC).
5. ('79) ILR 4 Cal 172 (182) : 5 Ind App 178 (195) (PC).
6. (1819) 4 Law Ed 579 (600) : 4 Wheat 316 (401).

of the Supreme Court of America, when considering the question whether the Congress of the United States had the power to enact legislation as to incorporation of Banks, observed as follows :

> "The first question made in the cause is, has Congress power to incorporate a bank? It has been truly said that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive Legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.
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> "It will not be denied that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded."

In *United States* v. *Curtiss-Wright Export Corporation*,[7] the Supreme Court of America observed as follows :

> "The result of holding that the joint resolution here under attack is void and unenforceable as constituting an unlawful delegation of legislative power would be to stamp this multitude of comparable acts and resolutions as likewise invalid. And while this Court may not, and should not, hesitate to declare acts of Congress, however many times repeated, to be unconstitutional if beyond all rational doubt it finds them to be so, an impressive array of legislation such as we have just set forth, enacted by nearly every Congress from the beginning of our national existence to the present day, must be given unusual weight in the process of reaching a correct determination of the problem. A legislative practice such as we have here, evidenced not by only occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice, to be found in the origin and history of the power involved, or in its nature, or in both combined."

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[7] (1936) 81 Law Ed 255 (266, 267) : 299 U S 304 (327).

But, as is recognized in *United States* v. *Curtiss-Wright Export Corporation*[8] in the passage quoted above, legislative practice, however long continued, cannot validate a course which is plainly unconstitutional. It is legitimate to invoke legislative practice as an aid only in case of doubt. Moreover, the legislative practice must be uniform and long continued if it is to be relied on as a binding matter. In this connection, the following observations of Kania C. J. in *In re the Delhi Laws Act, 1912*[9] may be quoted :

> "Unless the legislative practice is overwhelmingly clear, tolerance or acquiescence in the existence of an Act without a dispute about its validity being raised in a Court of law for some years cannot be considered binding, when a question about the validity of such practice is raised and comes for decision before the Court."

Similarly, judicial interpretation of a certain word occurring in a particular class of legislation, which places a limited construction on such word for the purpose of the particular legislation in question, cannot be regarded as proof of a *legislative practice* limiting the meaning of the word for all legislative purposes. Thus, it has been held by the Supreme Court that the mere fact that the word "income" as used in Income-tax Acts has been judicially interpreted as not including capital gains is not sufficient to prove a "legislative practice" of limiting the meaning of the word "income" for all purposes and that the word "income" in the Government of India Act, 1935, SCH. VII, LIST 1, ITEM 54, must be interpreted in its ordinary sense which includes "capital gains".[10]

13. Doctrine of immunity of instrumentalities. — It is an established doctrine of the American Constitution that there is an implied prohibition against the exercise of power by the Federal Legislature and the State Legislatures so as to impede the operation of the laws made by each other.[1] In *Hammer* v. *Dagen-*

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8. (1936) 81 Law Ed 255 (266, 267) : 299 U S 304 (327).

9. 1951 S C 332 (344) [AIR V 38 C 56] : 1951 S C R 747 (790) (SC).

10. 1955 S C 58 (60, 62) [(S) A I R V 42 C 14] : 1955 S C R 829 (S C), *Navinchandra* v. *Commr. of I.-T., Bombay*. (*Held* therefore that Act 22 of 1947 which amended the Indian Income-tax Act by enlarging the definition of "income" in S. 2 (6-C) and introducing a new head of income in S. 6 and inserting the new Section 12-B is *intra vires* the powers of the Central Legislature acting under Entry 54 in List I of the Seventh Schedule of the Government of India Act, 1935.)

Article 246 — Note 13

1. (1918) 62 Law Ed 1101 (1107) : 247 U S 251 (276), *Hammer* v. *Dagenhart*. (*Held* that the impugned Act of the Congress was not a lawful exertion of Congressional authority over inter-state commerce but was an invasion by the Federal power, of the control of a matter purely local in its character and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States.)

hart,[2] the Supreme Court of America observed as follows :

> "We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the States. This Court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and State, to the end that each may continue to discharge harmoniously with the other the duties intrusted to it by the Constitution."

Another aspect of the same principle is what is known as the principle of immunity of instrumentalities[3] although in its application to federal agencies this principle was reinforced by the principle of the supremacy of the Federal Government.[4] In *M'Culloch* v. *The State of Maryland*,[5] Chief Justice Marshall of the Supreme Court of America observed as follows :

> "The Government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of

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(1824) 9 Wheat 1 (195) : 6 Law Ed 23 (70), *Gibbons* v. *Ogden*. (The Act of the Legislature of the State of New York granting to certain persons the exclusive navigation of all the waters within the jurisdiction of that State with boats moved by fire or steam for a term of years are repugnant to that clause of the Constitution of the United States which authorizes Congress to regulate commerce so far as the said Acts prohibit vessels licensed, according to the laws of the United States, for carrying on the coasting trade, from navigating the said waters by means of fire or steam.)

[*See* (1920) 64 Law Ed 834 (840) : 253 U S 149 (154), *Knickerbocker Ice Co.* v. *Stewart*. (Congress exceeded its constitutional power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement by attempting as it did in the Act of 6-10-1917, to permit the application of Workmen's Compensation Laws of the several States to inquiries within the admiralty and maritime jurisdiction thus virtually destroying the harmony and uniformity which the constitution not only contemplated but actually established.)]

2. (1918) 62 Law Ed 1101 (1107) : 247 U S 251 (276).

3. (1939) 83 Law Ed 927 (931) : 306 U S 466 (477, 480, 487), *Graves* v. *New York*. (The theory of tax immunity of either Government, State or national, and its instrumentalities from taxation by the other, has been rested on an implied limitation on the taxing power of each, such as to forestall undue interference, through the exercise of that power, with the Governmental activities of the other. The two types of immunity may not in all respects stand on a parity.)

4. (1819) 4 Law Ed 579 (609) : 4 Wheat 316 (436), *M'Culloch* v. *The State of Maryland*. (The States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general Government. This is the unavoidable consequence of that supremacy which the Constitution has declared.)

5. (1819) 4 Law Ed 579 (601) : 4 Wheat 316 (406).

the Constitution, form the supreme law of the land, 'anything in the Constitution or laws of any State to the contrary notwithstanding'."

The doctrine of immunity of instrumentalities as applied to the Federal Government in America means that the property, possessions, institutions and activities of the Federal Government, in the absence of any express Congressional consent, are not subject to any form of State taxation.[6] This doctrine was first expounded by Chief Justice

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6. (1946) 90 Law Ed 851 (855) : 327 U S 558 (561, 562), *S. R. A.* v. *Minnesota.* (The supremacy of the Federal Government in the Union forbids the acknowledgment of the power of any State to tax property of the United States against its will. Under an implied constitutional immunity its property and operations must be exempt from State control in tax, as in other matters. This postulate, as a matter of federal law, forces final decision of the validity of claimed exemptions under this immunity upon the Supreme Court. The impact of State taxation on federal operations may be so close and threatening as to compel judicial intervention to declare the State tax invalid, or so remote and incidental as to justify a federal Court in refusing to relieve a tax payer from a State tax.)

(1944) 88 Law Ed 1209 (1214) : 322 U S 174 '(177), *United States* v. *County of Allegheny.* ("In recent years, this Court has curtailed sharply the doctrine of implied delegated immunity—But the principle is unshaken that possessions, institutions and activities of the Federal Government in absence of express Congressional consent are not subject to any form of State taxation.")

(1931) 75 Law Ed 1277 (1281) : 283 U S 570 (575), *Indian Motocycle Co.* v. *United States.*

(1902) 187 U S 1 (7) : 47 Law Ed 49, *Ambrosini* v. *United States.*

(1900) 178 U S 115 (117, 118) : 44 Law Ed 993, *Plummer* v. *Coler.* (It is not open to question that a State cannot, in the exercise of the power of taxation, tax obligations of the United States.)

(1890) 133 U S 496 (504) : 33 Law El 687, *Wisconsin Central Railroad Co.* v. *Price County.* (A State has no power to tax the property of the United States within its limits. This exemption of their property from State taxation—and by State taxation is meant any taxation by the authority of the State, whether it be strictly for State purposes or for mere local and special objects—is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency.)

(1888) 127 U S 1 (41) : 32 Law Ed 150, *California* v. *Central Pacific Railroad Co.* (Franchise granted by Congress cannot be subject to taxation by a State without the consent of Congress. Taxation is a burden and may be laid so heavily as to destory the thing taxed or render it useless. A power given to a person or corporation by the United States cannot be subjected to taxation by a State.)

(1819) 4 Law Ed 579 (609) : 4 Wheat 316 (436), *M'Culloch* v. *The State of Maryland.* (Tax by State (Maryland) on Bank of United States is unconstitutional and void. But this does not apply to Bank's real property in the State or to tax on the interests which the citizens of Maryland may hold in the institution. But this is a tax on the operations of the bank and consequently on an instrument employed by the Government of the union to carry its power into execution.)

Marshall in *M'Culloch* v. *The State of Maryland*.[7]

The principle of immunity of instrumentalities is also applicable to instrumentalities employed by the States. Just as the properties and the means and instrumentalities employed by the general Government and carrying into operation the powers granted to it are exempt from taxation by the States, so are those of the States exempt from taxation by the general Government.[8]

The principle of immunity of instrumentalities of the Federal Government from State taxation and *vice versa* does not apply to *individuals*.[9] So also, when a State embarks on a business which

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[7] (1819) 4 Law Ed 579 (606) : 4 Wheat 316 (425, 426).

[8] (1930) 75 Law Ed 1277 (1281) : 283 U S 570 (575), *Indian Motocycle Co.* v. *United States*. (This principle is implied from the independence of the National and State Governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system.)

(1902) 187 U S 1 (7) : 47 Law Ed 49, *Ambrosini* v. *United States*. (It rests on the law of self-preservation, for any Government whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct Government exists only at the mercy of the latter.)

(1900) 178 U S 115 (117, 118) : 44 Law Ed 998, *Plummer* v. *Coler*. (It is not open to question that a State cannot, in the exercise of the power of taxation, tax obligations of the United States. So likewise it is settled law that bonds issued by a State, or under its authority by its public municipal bodies, are not taxable by the United States. The reasoning upon which the two lines of decisions proceed is the same. The general Government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. The former in its appropriate sphere is supreme, but the States, within the limits of their powers not granted or 'reserved', are as independent of the general Government as that Government in its sphere is independent of the States. As the States cannot tax the powers, the operations or the property of the United States nor the means which they employ to carry their powers into execution, so the United States have no power under the Constitution to tax either the instrumentalities or the property of a State.)

[*See* (1937) 301 U S 619 (640) : 81 Law Ed 1307, *Helvering* v. *Davis*. (Scheme of the benefits created by the provisions of title II of the Social Security Act of 1935 is not in contravention of the limitations of the Tenth Amendment.)

(1937) 301 U S 548 (585) : 81 Law Ed 1279, *Charles C. Steward Machine Co.* v. *Davis*. (That a Federal tax is imposed in the hope or expectation that some other and collateral good will be furthered as an incident will not render it invalid.)]

[9] (1946) 327 U S 558 (564) : 90 Law Ed 851, *S. R. A.* v. *Minnesota*. (An executory contract for the sale of lands by the United States to a private purchaser, under which the purchaser is given possession and is to receive the legal title upon payment of the purchase price operates to subject the lands to the tax laws of the State.)

(1941) 314 U S 1 (6, 7, 8) : 86 Law Ed 3, *Alabama* v. *King & Boozer*. (Constitutional immunity of the United States from State taxation is not infringed by the exaction of a State sales tax, with which the seller is chargeable but which he is required to collect from the buyer, in respect of materials purchased by a would normally be taxable, the fact that in so doing it is exercising its governmental powers does not render the activity immune from Federal taxation.[10]

The above principles of implied prohibitions and immunity of instrumentalities have been held not applicable to the Canadian Constitution.[11]

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contractor with the United States on a cost-plus basis for use in carrying out his contract, notwithstanding the economic burden of the tax is borne by the United States.)

(1939) 306 U S 466 (477, 480, 487) : 83 Law Ed 927 (931), *Graves* v. *New York*. (The imposition by a State of a non-discriminatory tax in respect of the salary of an employee of a corporate instrumentality of the Federal Government does not place an unconstitutional burden on the Federal Government where Congress has not conferred on the salaries of the employees of such instrumentality an immunity from State taxation.)

(1938) 304 U S 439 (449, 450) : 82 Law Ed 1448, *Allen* v. *Regents of University System of Georgia*. (The exaction of a federal admission tax in respect of athletic contests in which teams representing Colleges maintained by a State participate does not unconstitutionally burden a governmental function of such State, even though the expense of physical education and athletic programmes at such Colleges is largely defrayed from such admission charges.)

(1938) 82 Law Ed 1427 (1430, 1436, 1437) : 304 U S 405 (408, 419, 420), *Helvering* v. *Gerhardt*. (The imposition of a Federal income-tax on salaries received by employees of a corporation created as a State agency to reconstruct and operate transportation and terminal facilities in a certain district does not place an unconstitutional burden on the States served by the corporation.)

(1938) 303 U S 376 (382, 383) : 82 Law Ed 907, *Helvering* v. *Mountain Producers Corporation*. (A lessee under a lease for producing oil and gas of State school lands is not entitled to immunity, as a State instrumentality, from Federal taxation in respect of income derived from the sale of the oil.)

[*See* (1937) 300 U S 352 (360, 363) : 81 Law Ed 691, *Brush* v. *Commissioner of Internal Revenue*. (Acquisition and operation of a municipally owned water system is, even though a charge is made for water furnished to private consumers, a *governmental function* within the rule that the *salaries* of municipal officers and employees engaged in the performance of governmental functions are not taxable by the Federal Government.)]

10. (1938) 304 U S 439 (451, 453) : 82 Law Ed 1448, *Allen* v. *Regents of University System of Georgia*.

(1905) 199 U S 437 (463) : 50 Law Ed 261, *South Carolina* v. *United States*. (The United States may, under the Federal Constitution, exact the license taxes prescribed by the internal revenue laws for dealers in intoxicating liquors from the dispensing and selling agents of a State which, in exercise of its sovereign powers, has taken charge of the business of selling such liquors.)

11. (1937) 1 All E R 249 (254) : 1937 App Cas 260, *Forbes* v. *The Attorney-General of Manitoba*. (The validity of imposing direct taxation by Provincial legislation on a *Dominion Official* has been expressly established by authority in the case of *Abbott* v. *St. John City*, (1908) 40 S C R 597 which was approved by the Board in *Caron* v. *R* (1924) 1924 App Cas 999—For a similar Privy Council case which was from Australia, see *Webb* v. *Outrim*, (1907) 1907 App Cas 81.)

(1902) 1902 App Cas 73 (79) : 71 L J P C 28, *Attorney General of Manitoba* v. *Manitoba Lincence Holders Association*. (A **Provincial** Legislature has juris-

In *Bank of Toronto* v. *Lambe*,[12] the question arose as to whether a Province had the power to tax a bank. Under the Canadian Constitution, although the Province had the power of imposing direct taxation, banking was a Dominion subject and it was contended that to allow a Province to tax a bank might interfere with the exercise of power by the Dominion in regard to banking and incorporation of banks. Reliance was placed on the principles laid down by Marshall, C. J., for the United States. The Privy Council, however, rejected the contention and held that the principles laid down by Marshall, C. J., could not appropriately be applied to the Canadian Constitution which made an elaborate distribution of the whole field of legislative authority. Lord Hobhouse, in delivering the judgment of the Privy Council, observed as follows:

> "Then it is suggested that the Legislature may lay on taxes so heavy as to crush a bank out of existence, and so to nullify the power of Parliament to erect banks. But their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes. There are obvious reasons for confining their power to direct taxes and licences, because the power of indirect taxation would be felt all over the Dominion. But whatever power falls within the legitimate meaning of classes 2 and 9

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diction to restrict the sale within the Province, of intoxicating liquors so long as its legislation does not conflict with any legislative provision which may be competently made by the Parliament of Canada and which may be in force within the Province or any district thereof. The judgment in *Attorney-General for Ontario* v. *Attorney-General for Canada*, 1896 App Cas 348, shows that matters which are substantially of local or private nature do not cease to be so because legislation dealing with them, however carefully it may be framed, may or must have an effect outside the limits of the Province and may or must interfere with sources of Dominion revenue and industrial pursuits of persons licensed under Dominion statutes to carry on particular trades.)

(1887) 12 App Cas 575 (587) : 56 L J P C 87, *Bank of Toranto* v. *Lambe*.

[See however 1921 P C 148 (151) [AIR V 8] (PC), *Great West Saddlery Co. Ltd.* v. *King*. (Within the spheres allotted to them by the British North America Act the Dominion and the Provinces are rendered on general principle co-ordinate Governments. As a consequence, where one has legislative power the other has not, speaking broadly, the capacity to pass laws which will interfere with its exercise. What cannot be done directly cannot be done indirectly.)

1914 P C 174 (178) [AIR V 1] (PC), *John Deere Plow Co. Ltd.* v. *T.F. Wharton*. ("The status and powers of a Dominion company as such cannot be destroyed by Provincial legislation.")]

[12] (1887) 12 App Cas 575 (586, 587) : 56 L J P C 87.

is, in their Lordships' judgment, what the Imperial Parliament intended to give; and to place a limit on it because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties, in the construction of the Federation Act.

"Their Lordships have been invited to take a very wide range on this part of the case, and to apply to the construction of the Federation Act the principles laid down for the United States by Marshall, C. J. Every one would gladly accept the guidance of that great Judge in a parallel case. But he was dealing with the Constitution of the United States. Under that Constitution, as their Lordships understand, each State may make laws for itself, uncontrolled by the federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a Constitution Marshall, C. J., found one of those limits at the point at which the action of the State legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow no power to the provincial legislatures under S. 92, which may by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under S. 91. It is quite impossible to argue from the one case to the other. Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General. And the question they have to answer is whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a legislative power falls within S. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion Parliament."

The principles laid down by Marshall, C. J., in *M'Culloch* v. *The State of Maryland*,[13] have also been held not applicable to the Australian Constitution.[14]

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[13] (1819) 4 Law Ed 579 (606) : 4 Wheat 316.

[14] (1907) 1907 App Cas 81 (87, 88, 91) : 76 L J P C 25, *Webb* v. *Outrim*. (No implied prohibition against State income-tax on Commonwealth Officer residing in State.)

[See however (1904) 1 Com L R 91 (Aus), *D. Emden* v. *Pedder*. (If a State attempts to give its legislative or executive authority an operation which, if valid, would interfere to any, the smallest extent, with the free exercise of

The question arises as to how far the American doctrine of immunity of instrumentalities and implied prohibitions is applicable to the Indian Constitution. It has been seen in NOTE 1 that the distribution of powers between the Centre and the Units under the Indian Constitution follows the Canadian model rather than the American one. The enumeration of powers of both the Central and State Legislatures is as exhaustive as possible although by way of abundant caution provision has been made for the exercise of residuary powers also. Under such an elaborate scheme of distribution there would seem to be no scope for the importation of any doctrine of implied prohibitions and immunities. The considerations embodied in the observations of Lord Hobhouse in *Bank of Toronto* v. *Lambe*,[15] which have already been quoted above, seem to be quite applicable to the Indian Constitution also. Whether in any given case the subject-matter of legislation falls within the jurisdiction of the Union or the State has, therefore, to be decided entirely on the basis of the entries in the legislative lists, considered with reference to the pith and substance and the true character and nature of the legislation. Where the legislation so considered falls within the jurisdiction of the particular Legislature by which it has been passed, there is no need to speculate as to its possible consequences on laws that may be made by another Legislature. See in this connection NOTE 8. See also NOTE 16. Hence, the fact that a Provincial law prohibiting the possession and consumption of intoxicating liquor might adversely affect the revenues of the Central Government derived from import duties will not invalidate the law.[16] So also, the fact that the proprietary right in anything is vested in the Union is itself no bar to the State legislating about such thing, where the matter falls within the legislative jurisdiction of the State.[17] (See in this connection, however, LIST I, Entry 32 and LIST II, Entry 35 of Sch. VII. See also ART. 294, NOTE 8.)

It must also be noted that there are express provisions in the Constitution regarding the exemption from taxation of Government property. Such provision as regards Union property is contained in ART. 285, and as regards State property, is contained in ART. 289. See also ARTS. 287 and 288 under which restrictions are laid on the power of States to impose taxes on consumption of electricity by Central Government and Railways, and in respect of electricity and water stored, generated, consumed or sold by river valley authorities.

(the legislative or executive power of the Commonwealth, the attempt, unless expressly authorised by the Constitution, is invalid and inoperative.)]

[15] (1887) 12 App Cas 575 (586, 587) : 56 L J P C 87.

[16] 1940 Bom 307 (310, 311) [A I R V 27] : 42 Cri L Jour 74 (SB), *Emperor* v. *Dantes*.

[17] 1954 Mad 291 (301) [AIR V 41 C 125] : I L R (1953) Mad 1175 (DB), *A. M. S. S. V. M. & Co.* v. *State of Madras*.

Under the maxim *expressum facit ceasare tacitum*, these express provisions must be taken to exclude any scope for the importation of any further prohibitions of Federal or State instrumentalities by implication.[18]

Attention may also be drawn to ART. 257 (corresponding to S. 126 of the Government of India Act, 1935, under which it is expressly provided that the executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union. There is no similar provision with regard to the exercise of the legislative power, and this seems to be a further pointer to the same conclusion, namely, that as regards the legislative competency of the State and Union Legislatures, from the point of view of the matter legislated upon, there is no scope for the importation of any implied prohibitions on the lines of the American Constitution.

See also ARTS. 285, 287, 288 and 289 and commentary thereon.

14. **"With respect to."** — The expression "with respect to" has been used in this article to indicate the scope of the legislative power from the point of view of the subject-matter of legislation conferred by it. The laws made by the Legislature must be "with respect to" any of the matters indicated. The expression "with respect to" has been borrowed from Ss. 51 and 52 of the Commonwealth of Australia Constitution Act, 1900. The words used in the Canadian Constitution (British North America Act, 1867), Ss. 91 and 92, are "in relation to." The words in S. 100, Government of India Act, 1935, were also "with respect to."

The words "with respect to" connote a double sense. In the first place, it indicates that the legislation must be substantially in respect of the matter mentioned in the particular legislative entry. A remote connection with such matter would not make the legislation one "with respect to" such matter.[1] At the same time, the legislative power will extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in that topic of legislation.[2] In other words, the expression "with respect to" conveys

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[18] Compare (1907) 1907 App Cas 81 (89) : 76 L J P C 25, *Webb* v. *Outrim*. (In this case Lord Halsbury referred to the above maxim in holding that the express provision in S. 114 of the Australian Constitution excluded the applicability of the broad American doctrine to the Australian Constitution. Under S. 114 the mutual exemption from taxation by State and Commonwealth was limited to taxes on properties.)

Article 246 — Note 14

[1] 1954 S C 251 (252) [A I R V 41 C 55] : 1954 S C R 779 (SC), *Rajahmundry Electric Supply Corporation* v. *State of Andhra*. (Madras Electricity Supply Undertakings (Acquisition) Act (43 of 1949) is in pith and substance an Act to provide for acquisition of electric undertakings and not one with respect to 'electricity' under Government of India Act, 1935, List 3, Entry 31 or one with respect to 'corporations' under List 1, Entry 33.)

1941 F C 47 (51) [AIR V 28] (FC), *Subrahmanyan* v. *Muthuswami*. (Per *Sulaiman J.* — The expression "with respect to" means that in substance the enactment must fall under the particular legislative entry.)

1941 F C 16 (35) [A I R V 28] (FC), *United Provinces* v. *Atiqa Begum.* (Per *Sulaiman J.*—The words 'with respect to' are not necessarily the exact equivalent of 'relating to' or 'connected with'. These words may not include a case where the subject of legislation is only remotely related or very indirectly connected with the matters mentioned in the categories An Act may principally be with respect to some other subject and yet it may incidentally relate to one under consideration. The mere fact that there is a slight, remote or indirect relation or connection would not be sufficient to answer in the affirmative the question whether it is *with respect to* such subject. It is not enough that it should in its working somehow overreach that subject. It has to be seen whether it appertains to such matters *substantially and directly*, and not only whether it would in actual operation affect any such matters in an indirect way. Again, a provision of law may be partly in one category and partly outside it. The mere fact that it is partly in that category would not suffice for making it valid if it is *ultra vires* with regard to other portion. When the question is whether any impugned Act is within any of the three lists, or in none at all, it is the duty of Courts to consider the Act as a whole and decide whether in pith and substance the Act is with respect to particular categories or not. This can be inferred only from the design and purport of the Act as disclosed by its language and the effect which it would have in its actual operation (P. 35).

Per *Varadachariar J.*—The words 'with respect to' are not by any means less comprehensive than the words 'relating to'. (P 45).)

[*See* 1942 Cal 429 (433) [AIR V 29] (DB), *Satish Chandra* v. *Sudhir Krishna.* (Words "with respect to" in Government of India Act, 1935, Sch. 7, List II, Item 2 mean "on the subject of.")]

[2] 1955 S C 58 (61) (Pr 6) [(S) A I R V 42 C 14] : 1955 S C R 829 (SC), *Navinchandra* v. *Commr. of I. T. Bombay.*

1951 S C 69 (84) (Pr 49) [AIR V 38 C 10] : 1951 S C R 51 (SC), *State of Bombay* v. *Narottamdas.* (Power to legislate as to "administration of justice" in Government of India Act, 1935, List II, Entry 1 includes power to make provision for jurisdiction of Courts as otherwise the legislation will be useless. (Per Mahajan, Fazl Ali and Mukherjea JJ.)—But all the Judges agree that Bombay City Civil Court Act, 1948 is *intra vires*, the former under List II, Entry 1 and latter under List II, Entry 2.)

1941 F C 16 (25) [AIR V 28] (FC), *United Provinces* v. *Atiqa Begum.*

('51) 52 Cri L Jour 243 (247) (Pr 17) (F C Pak), *Muhammad Ali* v. *Crown.* (Wide meanings to be given to words conferring power to legislate—Punjab Public Safety Act 2 of 1947 is not *ultra vires* of Provincial Legislature as subject-matter of Act falls under List II, item 1 and not under List 1, item 1, Government of India Act.)

1956 Nag 1 (5) (Pr 28) [(S) AIR V 43 C 1] (DB), *Vino Chemical & Pharmaceutical Works* v. *State.* (The power to legislate on any topic includes all necessary and incidental powers to make the legislation effective and prevent its frustration—Power derived from Item 8 in List II Sch. VII, can be used to prohibit the consumption of intoxicating liquors and there is always the ancillary power to prohibit the misuse of medicinal products.)

1954 All 728 (731) (Pr 10) [AIR V 41 C 289] : ILR (1954) 2 All 191 : 1954 Cri L Jour 1485 (DB), *Durgeshwar* v. *Secretary Bar Council.* (The words "with respect to" mean the whole field of legislation.)

virtually the same sense as is imported by the rule of pith and substance.[3] (See also NOTE 9.)

Thus, the expressions used in the entries in the legislative lists to indicate the matters within the ambit of the legislative power of the respective Legislatures must be given a broad and comprehensive connotation[4] subject only to such limitations as may be required to

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1954 Bom 204 (205) [AIR V 41 C 53] : ILR (1954) Bom 434 (DB), *A. C. Patel* v. *Vishwanath*,

1951 Bom 397 (403) [AIR V 38 C 85] : ILR (1952) Bom 105 : 52 Cri L Jour 1381 (DB), *Agarwal, Ayengar & Co.* v. *The State*. (In construing any particular entry widest import should be given to the language used and it carries with it powers to legislate with regard to all ancillary and subsidiary matters — This principle however does not apply to bodies to which subordinate powers of legislation have been delegated.)

1949 Lah 207 (208, 209) [A I R V 36 C 41] : Pak L R (1949) Lah 205 : 50 Cri L Jour 976, *Muhammad Ali* v. *The Crown*. (The entries in the legislative lists merely mention certain categories of subjects and all subjects allied or ancillary to these categories must be taken to fall within the categories mentioned.)

1946 Bom 216 (245) [AIR V 33 C 59] : ILR (1946) Bom 517 : 47 Cri L Jour 594, *Tan Bug Taim* v. *Collector of Bombay*. ("Land" in Government of India Act, 1935, List II, Item 21 is limited in its scope by the use of the words "that is to say" — Requisitioning of land is not ancillary or subsidiary to legislation on 'land'.)

1945 Mad 211 (214) [AIR V 32] : ILR (1945) Mad 697 (DB), *Manikka Sundara* v. *R. S. Nayudu*.

1945 Pat 444 (445) [A I R V 32] : I L R 24 Pat 418 : 47 Cri L Jour 463 (DB), *Sardar Dalip Singh* v, *Governor of Bihar*.

1942 All 156 (163) [A I R V 29] : 43 Cri L Jour 674, *Emperor* v. *Munnalal*. ("With respect to" means "on the subject of" which implies power to *regulate* and this implies power to impose restrictions.)

1942 Cal 429 (433) [AIR V 29] (DB), *Satish Chandra* v. *Sudhir Krishna*. (The words "with respect to" in the Government of India Act, 1935, Sch. 7, List II, Item 2 mean "on the subject of." What has to be determined in each case is the subject of the legislation, and not what things or operations it may indirectly affect. When the Legislature is given power to legislate "with respect to" certain subjects, it may exercise all necessary and incidental powers including the power of passing ancillary provisions which may not be strictly and directly referable to the actual heading under which the power is granted. The power of legislation with respect to land, land tenure, the relation of landlord and tenant and the collection of rents, under Sch. 7, List II, Item 21 would mean and include the power of legislation with respect to the rights, privileges, obligations and liabilities relating to them, any relief or remedy in respect of any such right, liability, etc., and the mode of realization of such relief or remedy, or the procedure for obtaining that relief.)

(1819) 4 Law Ed 579 (601) : 4 Wheat 316 (407), *M'Culloch* v. *The State of Maryland*.

[3] 1941 F C 47 (54) [A I R V 28] (F C), *Subrahmanyan* v. *Muttuswami*. (Per *Sulaiman J.*)

[4] 1955 S C 58 (61) (Pr 6) [(S) A I R V 42 C 14] : 1955 S C R 829 (S C), *Navinchandra* v. *Commr. of I.-T., Bombay*.

1951 S C 318 (322) (Pr 7) [AIR V 38 C 55] : 1951 S C R 682 (693): 52 Cri L Jour 1361 (S C), *State of Bombay* v. *F. N. Balsara*. (None of the items in each list is to be read in a narrow or restricted sense : A I R 1941 F C 16, *Foll.*)

1951 S C 69 (83, 97) (Prs. 48, 94) [A I R V 38 C 10] : 1951 S C R 51 (SC), *State of Bombay* v. *Narottamdas*. (Per *Mahajan, Mukherjea and Fazl Ali JJ.* — Government of India Act, List II, Entry 1 includes jurisdiction — Per *Das & Patanjali Sastri JJ.* — General jurisdiction can be conferred under the same list, Entry 2 and in the presence of specific entries as to jurisdiction, Entry 1 which is general cannot be held to include jurisdiction.)

1942 F C 17 (20) [AIR V 29] : 43 Cri J Jour 481 (FC), *Bhola Prasad* v. *Emperor*. (Per *Gwyer C. J.* — Indian Legislatures have within their own spheres plenary powers of legislation. Every intendment ought therefore to be made in favour of a Legislature which is exercising the powers conferred on it. Its enactments ought not to be subjected to the minute scrutiny which may be approporiate to an examination of the by-laws of a body exercising only delegated powers, nor is the generality of its power to legislate on a particular subject to be cut down by the arbitrary introduction of far-fetched and impertinent limitations.)

1942 F C 14 (16, 17) [AIR V 29] (FC), *Lahore Municipality* v. *Daulat Ram*. (It is one thing to say that the entry does not authorize taxation, but it is a different thing to say that taxation is excluded, as that will make a material difference in the operation of sub-s. (1) of S. 100, G. I. Act, 1935. The reference to salt in Entry No. 47 is unqualified ; and, therefore, it is not possible to put any limitation upon the extent of exclusion of provincial interference so far as this item is concerned. But the general mention of a subject as in Entry No. 47 was not meant merely to give a general power of control to the Central Legislature but also powers of taxation. Hence, the impost of octroi duty under S. 61 (2), Punjab Municipal Act is *ultra vires*.)

1941 F C 16 (25) [AIR V 28) (F C), *United Provinces* v. *Atiqa Begum*. (Government of India Act, 1935, Sch. VII, List II, Entry 21 — Collection of rents includes remission of rents.)

('51) 52 Cri L Jour 243 (247) (FC) (Pak), *Muhammad Ali* v. *The Crown*.

1949 Pat 1 (4) (Pr 5) [AIR V 36 C 1] : I L R 27 Pat 773 : 50 Cri L Jour 44 (FB), *Nek Mohammad* v. *Province of Bihar*.

1954 Bom 204 (205) (Prs 4, 5) [AIR V 41 C 53] : ILR (1954) Bom 434 (DB), *A. C. Patel* v. *Vishwanath*. (Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947)—Act falls within Entry 21, List II and not under Entry 2 of List I and therefore the Act is valid.)

1954 Bom 188 (190, 191) [AIR V 41 C 51] : ILR (1954) Bom 41 (DB), *Municipal Commissioner, Ahmedabad* v. *Gordhandas*.

('53) 55 Bom L R 246 (257) (DB), *United Motors (India) Ltd.* v. *State of Bombay*.

1953 Trav.-Co 540 (541) (Pr 4) [A I R V 40 C 206] : 1953 Cri L Jour 1786, *M. P. Menon* v. *State*. (Within the ambit of the words, so as to give the most sovereign power to the Legislature : A I R 1939 F C 1 (FC), *Foll.*)

1952 All 88 (89) (Pr 4) [A I R V 39 C 29] (DB), *Mt. Govindi* v. *State of Uttar Pradesh*.

1952 Bom 261 (Pr 5) [A I R V 39] : I L R (1953) Bom 446 (DB), *J. N. Duggan* v. *I.-T. Commr., Bombay City*.

1951 Bom 397 (403) [A I R V 38 C 85] : I L R (1952) Bom 105 : 52 Cri L Jour 1381 (DB), *Agarwal, Ayengar & Co.* v. *The State*.

1949 Lah 207 (208, 209) [A I R V 36 C 41] : Pak L R (1949) Lah 205 : 50 Cri L Jour 976, *Muhammad Ali* v. *The Crown*. (Within the ambit of these words the most sovereign power must be understood to be given to the Legislature.)

1948 Nag 199 (202) (Pr 11) [AIR V 35 C 69] : ILR (1947) Nag 579 : 49 Cr L Jour 230 (DB), *Om Prakash Mehta* v. *Emperor*. (Do.)

1945 Mad 211 (214) [AIR V 32] : I L R (1945) Mad 697 (DB), *Manikka Sundara* v. *R. S. Nayudu*.

give a meaning and effect to other legislative entries in case of overlapping.[5] In *M'Culloch* v. *The State of Maryland*,[6] Chief Justice Marshall of the Supreme Court of America observed as follows:

> "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of a prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients

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1945 Pat 444 (445) [A I R V 32] : I L R 24 Pat 418 : 47 Cri L Jour 463 (DB), *Sardar Dalip Singh* v. *Governor of Bihar*.

1942 All 156 (163) [A I R V 29] : 43 Cri L Jour 674, *Emperor* v. *Munna Lal*. (Law requiring sugar-cane grower to sell all the sugar-cane grown by him to a particular factory in the Province and law requiring manufacturer of sugar to sell all the sugar manufactured by him, at a reserved price, on a pooling arrangement, are laws in substance "in respect of agriculture and industry" and not "trade and commerce" or "production, supply and distribution of commodities" within S. 297 (1), G. I. Act, 1935, and hence not *ultra vires* the Provincial Legislature as indirectly preventing export and import of the sugar from the Province—*Dar J.*, observed : "By the Constitution Act, the responsibility of preserving and developing agricultural industry is laid on the Provinces and they are empowered to make laws 'with respect to' these subjects and the phrase 'with respect to' means 'on the subject of' and the subject designates, according to *Higgins J.* in *Union Label Case*, 6 C L R 469 (610), 'the centre and not the circumference of power and the Legislature can by definition increase the area of its legislative field'. Without going as far as *Higgins J.* has done, the power to make laws on the subject of agriculture and development of industries necessarily implies a power to regulate and a power to regulate necessarily carries with it a power to impose restrictions which indirectly may interfere with export or import of goods.")

[5] 1951 S C 318 (322) (Pr 7) [A I R V 38 C 55] : 1951 S C R 682 : 52 Cri L Jour 1361 (SC), *State of Bombay* v. *F. N. Balsara*. (Of the principles which govern the interpretation of the Legislative Lists, one is that none of the items in each List is to be read in a narrow or restricted sense; and the second is that where there is a seeming conflict between an entry in List II and an entry in List I, an attempt should be made to see whether the two entries cannot be reconciled so as to avoid a conflict of jurisdiction : A I R 1939 F C 1 (FC) and A I R 1945 P C 98 (PC), Rel. on.)

1939 F C 1 (7) [A I R V 26] (F C), *In re C. P. Motor Spirit Act*. (A grant of power in general terms standing by itself would no doubt be construed in the wider sense ; but it may be qualified by other express provisions in the same enactment, by the implications of the context, and even by considerations arising out of what appears to be the general scheme of the Act.)

1952 All 88 (89) (Pr 4) [A I R V 39 C 29] (DB), *Mt. Govindi* v. *State of Uttar Pradesh*. (The expression "with respect to" is of wide import and any legislation can be made so long as it is with respect to the subject-matter of a particular entry provided of course it is not inconsistent with the other provisions of the Constitution.)

[6] (1819) 4 Law Ed 579 (601) : 4 Wheat 316 (407).

which compose those objects be deduced from the nature of the objects themselves."

As seen in NOTE 1, the American Constitution does not contain an exhaustive enumeration of the fields of legislative power, while it is the unique feature of the Indian Constitution as well as the Government of India Act of 1935 that an attempt is made to enumerate exhaustively all the imaginable matters on which laws can be required to be made. Notwithstanding this difference, it must be remembered that the allocation of subjects in the three legislative lists in the Indian Constitution as well as in the Government of India Act, 1935, is not by way of scientific definition but by way of a mere simple enumeration of broad categories; and hence the legislative entries must be given a large and liberal interpretation.[7]

In *United Provinces* v. *Atiqa Begum*,[8] Gwyer, C. J. of the Federal Court observed as follows:

> "The subjects dealt with in the three legislative lists are not always set out with scientific definition. It would be practically impossible for example to define each item in the Provincial List in such a way as to make it exclusive of every other item in that list and Parliament seems to have been content to take a number of comprehensive categories and to describe each of them by a word of broad and general import. In the case of some of these categories, such as 'Local Government', 'Education', 'Water', 'Agriculture' and 'Land', the general word is amplified and explained by a number of examples or illustrations, some of which would probably on any construction have been held to fall under the more general word, while the inclusion of others might not be so obvious. Thus 'Courts of Wards' and 'treasure-trove' might not ordinarily have been regarded as included under 'land', if they had not been specifically mentioned in ITEM 21. I think however that none of the items in the lists is to be read in a narrow or restricted sense, and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. I deprecate any attempt to enumerate in advance all the matters which are to be included under any of the more general

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[7] 1949 Pat 1 (4) (Pr 5) [AIR V 36 C 1] : ILR 27 Pat 773 : 50 Cri L Jour 44 (FB), *Nek Mohammad* v. *Province of Bihar*.

1953 Trav Co 540 (541) (Pr 4) [A I R V 40 C 206] : 1953 Cri L Jour 1786, *M. P. Menon* v. *State*.

1949 Lah 207 (208, 209) [A I R V 36 C 41] : Pak L R (1949) Lah 205 : 50 Cri L Jour 976, *Muhammad Ali* v. *The Crown*.

1948 Nag 199 (202) (Pr 11) [A I R V 35 C 69] : I L R (1947) Nag 579 : 49 Cri L Jour 230 (DB), *Om Prakash Mehta* v. *Emperor*.

[8] 1941 F C 16 (25) [AIR V 28] (FC).

descriptions; it will be sufficient and much wiser to determine each case as and when it comes before this Court."

In *State of Bombay* v. *F. N. Balsara*,[9] Fazl Ali J., delivering the judgment of the Supreme Court, observed as follows:

> "Since the enactment of the Government of India Act, 1935, there have been several cases in which the principles which govern the interpretation of the legislative lists have been laid down. One of these principles is that none of the items in each list is to be read in a narrow or restricted sense: *vide United Provinces* v. *Atiqa Begum*.[10] The second principle is that where there is a seeming conflict between an entry in List II and an entry in List I, an attempt should be made to see whether the two entries cannot be reconciled so as to avoid a conflict of jurisdiction."

See also the undermentioned case.[11]

15. Scope and extent of legislative powers.—Within their allotted spheres, the Legislatures have plenary power of legislation.[1] The generality of the power of the Legislature to legislate on a particular subject must not be cut down by the introduction of far-fetched and impertinent limitations.[2] Hence, on the principles discussed in Note 14, the expressions used to describe the matters on which the Legislature can legislate must be given a wide and comprehensive interpretation[3] so as to include ancillary and subsidiary matters,[4] although the connection between a particular entry and the legislation, which is alleged to be covered by it, must not be too remote, and although the entries in the three legislative lists must be so interpreted as to reconcile them with each other in case of overlapping as far as possible.

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[9] 1951 S C 318 (322) [A I R V 38 C 55] : 1951 S C R 682 : 52 Cri L Jour 1361 (SC).

[10] 1941 F C 16 [AIR V 28] (FC).

[11] 1951 S C 69 (97) (Pr 94) [A I R V 38 C 10] : 1951 S C R 51 (SC), *State of Bombay* v. *Narottamdas*. (Per *Das J.* — Government of India Act, 1935, List II, Entry 2 : Constitution of India, List II, Entry 65—"With respect to" in the entry does not mean "over" but means "relating to" or "touching" or "concerning" or "for". So that "administration of justice" and "constitution and organisation of Courts" (Entry 1) can be one of the matters "with respect to" which the law can be made — There would be no meaning in saying that the Provincial Legislature can make a law about jurisdiction '*over*' "administration of justice.")

Article 246 — Note 15

[1] ('79) I L R 4 Cal 172 (180) : 5 Ind App 178 (PC), *Empress* v. *Burah*.

[2] 1942 F C 17 (20) [A I R V 29] : 43 Cri L Jour 481 (FC), *Bhola Prasad* v. *Emperor*.

1955 Assam 249 (260) (Pr 23) [(S) AIR V 42 C 59] (SB), *H. P. Barua* v. *State of Assam*.

1954 All 728 (731) (Pr 10) [A I R V 41 C 289] : I L R (1954) 2 All 191 : 1954 Cri L Jour 1485 (DB), *Durgeshwar* v. *Secretary, Bar Council*.

[3] 1955 S C 58 (61) (Pr 6) [(S) A I R V 42 C 14] : 1955 S C R 829 (SC), *Navinchandra* v. *Commr. of I.-T., Bombay*. (In construing an entry in a list conferring legislative powers the widest possible construction according to their ordinary meaning must be put upon the words used therein. "Income" in Sch. VII, List I, Entry 54 of Government of India Act includes capital gains.)

[4] 1955 S C 58 (61) (Pr 6) [(S) A I R V 42 C 14] : 1955 S C R 829 (SC), *Navinchandra* v. *Commr. of I. T., Bombay*.

Thus, in *Navinchandra* v. *Commissioner of Income-tax, Bombay*,[5] it was held by the Supreme Court that "income" in Government of India Act, 1935, SCH. VII, LIST 1, Entry 54, would include "capital gains".

So also, it has been held in *United Provinces* v. *Atiqa Begum*[6] that a power to legislate about the collection of rents will include a power to legislate about the remission of rents. In one of the judgments in that case, it was also pointed out that the power to legislate with respect to fisheries (Government of India Act, 1935, SCH. VII, LIST 2, Entry 24) would include the prohibition of fishing altogether in particular places or at particular time.[7] Similarly, in *Bhola Prasad* v. *Emperor*,[8] the Federal Court has held that the power to legislate with respect to intoxicating liquor would include the power to prohibit the production, possession or consumption of intoxicating liquor throughout the Province or any part of the Province. It was argued in this case that the inclusion of a subject in the legislative list indicated the intention of the Constitution Act to preserve the subject. Because, unless it was preserved, there would be no subject to legislate upon. Hence, it was argued that legislation tending to the destruction of subject-matter would be *ultra vires*. The contention was rejected and it was pointed out that the specifying of a particular subject-matter of legislation in an item did not necessarily indicate the intention of the Parliament that the subject-matter should be preserved and that this was clear from the presence in List 2 of the Government of India Act, of such legislative subjects as "unemploy-

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1956 Nag 1 (5) (Pr 28) [(S) A I R V 43 C 1) (DB), *Vino Chemical & Pharmaceutical Works* v. *State*. (The power to legislate on any topic includes all necessary and incidental powers to make the legislation effective and prevent its frustration. Power derived from Item 8 in List II, Sch. VII can be used to prohibit the consumption of intoxicating liquors and there is always the ancillary power to prohibit the misuse of medicinal products.)

1954 Bom 508 (511) [AIR V 41 C 132] : ILR (1954) Bom 1245 : 1954 Cri L Jour 1549 (DB), *Shantilal Vadilal* v. *State of Bombay*. (Press (Objectionable Matters) Act, 1951, S. 3 (5) falls under Concurrent List, Entry 39 — Its subject-matter is newspapers and not public order which is in the State List.)

5. 1955 S C 58 (62) (Pr 7) [(S) AIR V 42 C 14] : 1955 S C R 829 (SC).

6. 1941 F C 16 (25) [A I R V 28] (FC). (Case under Govt. of India Act, 1935, List 2, Entry 21.)

7. 1941 F C 16 (25) [A I R V 28] (FC), *United Provinces* v. *Atiqa Begum*. (Per *Gwyer C. J.*)

8. 1942 F C 17 (20) [AIR V 29] : 43 Cri L Jour 481 (FC). (Govt. of India Act, 1935, Sch. VII, List 2, Entry 31.)

ment" in ITEM 32, or "gambling" in ITEM 36. (See also NOTES 7, 8, and 14.)

Legislation for the purpose of validation of executive orders will be covered by the particular entry under which the subject-matter, in respect of which the executive order has been passed, falls. Because such legislation must necessarily be regarded as subsidiary or ancillary to the power of legislation on the subject mentioned in the particular entry.[9]

The power to legislate on a particular subject includes the power to legislate with regard to particular cases or classes of cases and not only generally.[10]

Where power is conferred to legislate regarding tax on capital value of assets, tax on some categories of assets would be *intra vires* and it would not be necessary that the tax must be on the capital value of all assets.[11]

Similarly, power to legislate as to "taxes on agricultural income" would include the power to legislate as to taxes on *some* categories of agricultural income.[12]

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9. 1941 F C 16 (26, 46) [AIR V 28] (FC), *United Provinces* v. *Atiqa Begum*. (The U. P. Regularisation of Remissions Act (14 of 1938) is an Act with respect to the remission of rent (Government of India Act, List 2, Item 21) and it was within the competence of the United Provinces Legislature to enact it. The Act is not opposed to S. 292, Government of India Act, 1935, and is *intra vires*: A I R 1940 All 272 (FB). *Reversed*.)

1944 F C 1 (10) [AIR V 31] : 45 Cri L Jour 413 (FC), *Piare Dusadh* v. *Emperor*. [*See* 1948 Lah 120 (125) (Pr 14) [A I R V 35 C 42] : 49 Cri L Jour 305 (DB), *Ahmad Khan* v. *Emperor*. (The object of a validating Act is to enable parties to carry into effect that which they have designed and attempted but which has failed of its expected legal consequences only by reason of some statutory disability or irregularity in their action. By their very nature such Acts operate on conditions already existing. They can validate acts which the Legislature could have authorised—not those which it could not.)]

10. 1944 P C 7 (11) [A I R V 31] : I L R (1945) Mad 1 (PC), *Abitibi Power Etc. Co.* v. *Montreal Trust Co.* (There is no authority and no reason for the opinion that legislation in respect of property and civil rights must be general in character and not aimed at a particular right. Such a restriction would appear to eliminate the possibility of special legislation aimed at transferring a particular right or property from private hands to a public authority for public purposes. The Legislature is supreme in these matters, and its actions must be assumed to be taken with due regard for justice and good conscience. They are not in any case subject to control by the Courts. If a Legislature can impose what may be a general moratorium there is no reason why its sovereign power should be so limited as not to enable it to impose, if it so desired, a moratorium limited to a special class of action or suitor or to one particular action or suitor.)

11. 1952 Bom 261 (Pr 5) [AIR V 39] : ILR (1953) Bom 446 (DB), *J. N. Duggan* v. *I.-T. Commr., Bombay City*. (Government of India Act, 1935, Sch. 7, List I, Entry 55.)

12. 1942 F C 8 (10) [A I R V 29] (FC), *Hulas Narain* v. *Province of Bihar*. (Therefore merely because the definition of agricultural income in the Bihar

The Legislature is not incompetent to legislate about Crown grants.[13] (See also ART. 245, NOTE 13 and ART. 294, NOTE 6.)

The Legislature can create a statutory fiction by enacting that something shall be deemed to have been done, which in fact and truth was not done.[14]

The legislative power includes the power to repeal or amend a law already made.[15] (See also Commentary on ART. 245 and ART. 294 NOTES 6, 7 and 8.)

(a) Legislative entries denote fields of legislation and not powers of legislation.

The various entries in LISTS 1 to 3 do not denote the powers of legislation but only fields of legislation.[16] Within the fields demar-

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Agricultural Income-tax Act is narrower than that in the Income-tax Act, by omission of para (c) of S. 2 (1), Income-tax Act, in the Bihar Act, it cannot be said that the Bihar Act is invalid.)

13. 1952 S C 252 (313) (Pr 213) [AIR V 39] : 1952 S C R 889, 1020, 1056 : ILR 31 Pat 565 (SC). *State of Bihar* v. *Kameshwar Singh.* (A I R 1946 P C 127 (PC), *Foll.*)

1946 P C 127 (129, 130) (A I R V 33 C 40) : 73 Ind App 123 : 1946 F C R 111 : I L R (1946) Kar (PC) 129 (PC), *Jagannath Baksh* v. *United Provinces.*

1951 All 674 (692) (Prs 96, 97) [A I R V 38 C 182) : I L R (1952) 2 All 46 (FB), *Suryapal Singh* v. *U. P. Govt.*

14. 1953 S C 244 (246) (Pr 5) [A I R V 40 C 58] : 1953 S C R 773 : 1953 Cri L Jour 1094 (SC), *State of Bombay* v. *Pandurang.* (When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion : *Ex parte Walton*; *In re Levy*, (1881) 17 Ch D 746 ; *East End Dwellings Co. Ltd.* v. *Finsbury Borough Council*, (1952) 1952 App Cas 109, *Rel. on.*)

1954 Punj 21 (22) (Pr 19) [AIR V 41 C 13] : ILR (1954) Punj 566 (DB), *Federal Bank of India* v. *Durga Das.* (Do)

15. 1954 Assam 161 (166) (Pr 12) [A I R V 41 C 51] : I L R (1954) 6 Assam 161 (DB), *G. C. Bezbarua* v. *State of Assam.* (An amendment by a separate statute which is a complementary legislation so long as it covers the appropriate field of legislation cannot be effectively challenged. Consequently amendment of S. 15 of the Industrial Disputes Act defining the duties of Tribunals, by S. 34, read with the schedule to the Industrial Disputes (Appellate Tribunal) Act of 1950, by omitting various sub-sections and introducing new S. 17A, cannot be challenged.)

1954 Mad 704 (705) [A I R V 41 C 234] : 1954 Cri L Jour 1126, *Mohammad Sheriff* v. *Mohammad Ibrahim.* (The amendment need not be made by an independent amending Act or by an Act which otherwise relates to the topic to which the amended Act relates—Thus amendment of Criminal Procedure Code (concurrent subject) may be contained in the Representation of the People Act (43 of 1951) (Union subject).)

1950 Pat 228 (235) [AIR V 37 C 56] : 51 Cri L Jour 936 (DB), *Tabarak Khan* v. v. *Province of Bihar.*

[*See* (1932) 146 L T 167 (168) : (1932) 2 K B 733, *Vauxhall Estates Ltd.* v. *Liverpool Corporation.* (No Act of Parliament can say that no future Act of Parliament shall interfere with the provisions of the earlier Act.)]

16. *See* 1952 S C 252 (264, 272) (Prs. 13, 43) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : I L R 31 Pat 565 (S C), *State of Bihar* v. *Kameshwar Singh.* (Per cated, the Legislature has plenary powers of legislation.[17] But the description, in the legislative entry, of the matter of legislation may itself involve limitations as to the exercise of the legislative power in regard to that subject.[18] In other words, the limitation may be inherent in the nature of the *subject-matter* on which the Legislature is authorised to legislate.[19] Thus, for instance, it was held by Mahajan, Das and Chandrasekhara Aiyar JJ. in *State of Bihar* v. *Kameshwar Singh*[20] that the words "acquisition or requisitioning of property" in LIST 2, Entry 36 themselves imply that the acquisition or requisitioning can only be made for a public purpose and that,

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Patanjali Sastri C. J. — The entries in the lists of the Seventh Schedule are designed to define and delimit the respective areas of legislative competence of the Union and State Legislatures, and such context is hardly appropriate for the imposition of *implied* restriction on the exercise of legislative powers, which are ordinarily matters for positive enactment in the body of the Constitution. The entries in the lists are merely legislative heads and are of an enabling character. Duty to exercise legislative power and in a particular manner cannot be read into a mere head of legislation.)

1944 F C 51 (61, 62) [AIR V 31] (F C), *Governor-General in Council* v. *Raleigh Investment Co. Ltd.* (Government of India Act, 1935, Sch. VII, List I, Entry 23 relating to "fishing and fisheries beyond territorial waters"—It would not be right to derive power to legislate on this topic merely from reference to it in the list.)

1952 All 88 (89) (Pr 4) [AIR V 39 C 29] (DB), *Mt. Govindi* v. *State of Uttar Pradesh.* (The words "subject to the provisions of Entry No. 42 of List III" do not by themselves mean that the State Legislature cannot legislate with respect to acquisition of property unless there is a public purpose and only on payment of compensation.)

1951 All 674 (678) (Pr. 9) [AIR V 38 C 182]: ILR (1952) 2 All 46 (FB), *Suryapal singh* v. *U. P. Govt.* (Entries in legislative lists do not prescribe the conditions subject to which legislative power is to be exercised.)

17. 1946 Bom 216 (233, 234) [AIR V 33 C 59] : I L R (1946) Bom 517 : 47 Cri L Jour 594, *Tan Bug Taim* v. *Collector of Bombay.*

18. 1951 Pat 91 (117, 118) [AIR V 38 C 15] : ILR 30 Pat 454 (S B), *Kameshwar Singh* v. *State of Bihar.* (The limitation on the power of legislation may arise by reason of restrictions imposed within the entry which confers the powers.)

19. *See* 1952 Bom 261 (264, 265) (Pr 6) [A I R V 39] : I L R (1953) Bom 446 (DB), *J. N. Duggan* v. *I. T. Commr., Bombay City.* (G. I. Act, Sch. VII, List 1, Entry 55 — "Taxes on capital value of assets, exclusive of agricultural land, of individuals and companies"—Tax on capital value of assets can only be levied on individuals and companies and not other categories of assessees under Income-tax Act — But Income-tax and Excess Profits Tax (Amendment) Act, 22 of 1947, may be held to be valid as regards individuals and companies and need not be held to be wholly void—*Chagla, C. J.*)

1946 Bom 216 (233, 234) [AIR V 33 C 59] : I L R (1946) Bom 517 : 47 Cri L Jour 594, *Tan Bug Taim* v. *Collector of Bombay.* (Govt. of India Act, 1935, Sch. VII, List II, Entry 9 — "Compulsory acquisition of land" does not authorise the compulsory *requisitioning* of property.)

20. 1952 S C 252 (271) (Pr. 41) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : I L R 31 Pat 565 (S C). (Patanjali Sastri, C. J., *contra.*)

therefore, the entry imposes (impliedly) a restriction on the power of the Legislature to enact a law for the acquisition or requisitioning of property otherwise than for a public purpose.

Where a limitation on the legislative power of the Legislature in regard to a subject is imposed by the provision in the body of the Constitution and an exception to such limitation is also provided by the body of the Constitution, the same limitation cannot be derived by implication from the entry in the legislative list so as to avoid the exception created by the body of the Constitution.[21]

Limitations on legislative power as regards the matters enumerated in the legislative lists cannot be derived merely from the "spirit" of the Constitution, supposed to pervade the Constitution but not expressed in its provisions.[22] (See also PREAMBLE, NOTE 5.)

The power of the Legislature to legislate on a matter specified in one of the legislative lists is not one coupled with a duty to exercise that power, and the Legislature is under no legal obligation to legislate on the topic merely because it is mentioned in one of the legislative lists and the legislation on that topic would be beneficial to a particular class of persons. The principle of *Julius* v. *Bishop of Oxford*[23] is not applicable to the powers of a Legislature to make a law with respect to any matter. The Legislature is under no obligation to make a law in respect of that power, for no obligation of that kind can be enforced by the Courts against the Legislature.[24]

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[21] 1952 S C 252 (264) (Pr. 12 [AIR V 39] : 1952 S C R 889, 1020 & 1056: I L R 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.* (Patanjali Sastri, C. J.—List II, Entry 36 and List III Entry 42—Conditions as to public purpose and payment of compensation are expressly provided in Art. 31 (2)—Art. 31 (4) makes certain exceptions to this rule—The same conditions, namely, the public purpose and payment of compensation, cannot be deduced by implication from List II, Entry 36 by itself or read with List III, Entry 42.)

[22] 1952 S C 252 (264, 309) (Prs. 12, 13, 201) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : I L R 31 Pat 565 (S C), *State of Bihar* v. *Kameshwar Singh.* (Patanjali Sastri C. J. — The conditions as to public purpose and payment of compensation for compulsory acquisition of land are matters of express provision in Art. 31 (2) to which Art. 31 (4) is an exception. These conditions cannot be deduced from the spirit of the Constitution so as to avoid the exception.)
1950 S C 27 (42) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras.*

[23] (1880) 5 App Cas 214 : 49 L J Q B 577.

[24] 1952 S C 252 (265) (Pr 16) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : I L R 31 Pat 565 (S C), *State of Bihar* v. *Kameshwar Singh.* (Argument was about List III, Entry 42—It was suggested that that was intended for the benefit of the person whose property was compulsorily acquired and hence Legislature was under an obligation when making a law for the compulsory acquisition of property to make provision for payment of compensation to the owner and hence was bound to exercise its power under Entry 42 and to lay down the principles on which compensation for property compulsorily acquired was to be paid.)

(a) The American doctrine of implied powers.

16. Doctrine of implied powers. — The doctrine of implied powers is a peculiar feature of the American Constitution, and it is a doctrine which has been entirely developed by the American Supreme Court by a process of construction of the Constitution, as it was originally promulgated. The result of evolution of this doctrine has been to transform by a process of judicial interpretation the original Constitution of America into something which was not contemplated by the framers of the Constitution. According to the scheme of distribution of powers, in the written Constitution of America, between the Federation and the States, the Congress, that is, the Federal Legislature, is only to have certain specified powers and the residuary power was conferred upon the States. The intention was that except in certain defined fields, governmental power must be vested in the States. (See NOTE 1.)

But very early in the history of the United States, the need for a strong Central Government with wide powers so as to cope with the economic and social changes that were taking place was felt and by giving a very wide interpretation to the powers conferred on the Federation by the Constitution and by holding that a number of powers which were not included in those expressly enumerated must be ascribed to the Federal Government by implication as necessary and proper for the carrying out of the powers expressly conferred,[1] the Supreme Court has succeeded in making the Federal Government one of very wide powers embracing a field which is very much wider than that originally allotted in express terms to the Federation. It has been remarked that "most of the strength which Hamilton unavailingly sought to endow Congress with in 1787 has been imparted by Chief Justice Marshall and his successors who have put vitality into a strip of parchment on which the nation was founded."

The verbal basis on which this doctrine of implied powers was built up is contained in ART. I sect. 8 cl. (18) which runs as follows :

> "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

Article 246 — Note 16

[1] (1877) 24 Law Ed 708 (710, 711) : 96 U S 1, *Pensacola Tel. Co.* v. *West Union Tel. Co.* (The power of *Congress* to regulate commerce with foreign nations and among the several states includes the control of the electric telegraph as an agency of commerce.)

[*See* (1901) 45 Law Ed 862 (865): 181 U S 283 (289), *Fairbank* v. *United States*. (The same rule (as stated in *M'Culloch* v. *The State of Maryland*, (1819) 4 Law Ed 579), and spirit of construction must also be recognized in considering the question of the *limitations* imposed by the Constitution on the action of the Congress as in considering the *powers* of the Congress.)]

The first seventeen clauses of ART. I sect. 8 enumerate the powers which the Congress shall have and the last clause which is quoted above gives power to the Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers. It is by interpreting this last clause that the Supreme Court of America has built up its doctrine of implied powers by which the Congress has been held competent to make laws which although they do not fall directly under any of the enumerated powers can reasonably be regarded as "necessary and proper for carrying into execution" the enumerated powers.

Willis in his CONSTITUTIONAL LAW of the UNITED STATES,[2] observes as follows:

> "While the federal government is a government of delegated powers, yet these powers include not only the powers expressly granted, but also those implied as a fair implication from the express powers granted. The 'necessary and proper' clause is perhaps the verbal basis for the doctrine of implied powers to the federal government. But this clause is not a grant of new and additional powers. For this reason, before an implied power can be found, there must first be found an express power or powers from which it may be implied or perhaps another implied power so derived. This means that the federal government has all the incidental and instrumental powers necessary and proper to carry into execution all of its express powers. The people who established the federal government did, it is true, limit the sphere of action of the federal government, but within that sphere they undertook to make it move with supreme authority. Thus, the power to incorporate a bank of the United States has been implied from the express powers of the federal government to collect taxes and to borrow money. The power to issue legal tender notes was first implied from the express powers to make war, to borrow money, to coin money, and to issue bills of credit (another implied power); and later, in peace time, from the power to borrow money; from the power to issue bills of credit, implied from the power to borrow money; and from the power to make coin legal legal tender, implied from the power to coin money. The power to take the Battlefield of Gettysburg by eminent domain was implied from the war power and from the power to tax for the common defence and general welfare. The power to punish officers of elections at which representatives are chosen for violation of duties imposed by state or federal law was implied from the express power of Congress over elections. The power to prohibit the manufacture

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[2] Constitutional Law of the United States by Prof. Willis, 1936 Ed., pages 217, 218.

> and sale of non-intoxicants was implied from the implied war power to prohibit the manufacture and sale of intoxicating liquors. Perhaps it would be better to say not that it was implied from an implied power, but that it was incident to the implied power to prohibit the manufacture and sale of intoxicating liquors. The power to establish farm loan banks was implied from the power to establish agencies for the deposit of public funds and sale of government bonds, and as an incident such banks were given the power to make farm loans. The power to pass an employers' liability act was implied from the express power to regulate commerce. Many other powers, like the power to improve rivers and harbours, to maintain coast surveys, life saving stations, and naval observatories, to regulate the liability of carriers, and to protect commerce against monopolies and illegal combinations have been implied from the commerce clause. The power to exclude lottery matter from the mails was implied from the express postal power. It has been held that Congress has the power to punish for contempt without criminal prosecution, implied from the express legislative power of Congress.''

The doctrine of implied powers was elaborately expounded by Chief Justice Marshall in *M'Culloch* v. *The State of Maryland.*[3] In that case the question was whether an Act incorporating the Bank of the United States was within the competence of the Congress. The contention was that the Act was *ultra vires* because the incorporation of the bank was not covered by any of the enumerated powers conferred by the Constitution, ART. I, Sec. 8, on the Congress. This contention was rejected and it was held that although the power was not expressly conferred, it was implied in the powers which were expressly conferred. Chief Justice Marshall observed as follows on this point :—

> "Although, among the enumerated powers of Government, we do not find the word 'bank' or 'incorporation', we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies . . . . . The Government entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution . . . . The Government, which has a right to do an act and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means . . . . The power of creating a corporation is never used for its own sake but for the purpose of effecting something else. No sufficient reason is, therefore, perceived why it may

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3. (1819) 4 Law Ed 579 (601, 602, 603, 605) : 4 Wheat 316.

not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them. But the Constitution of the United States has not left the right of the Congress to employ the necessary means for the execution of the powers conferred on the Government to general reasoning. To its enumeration of powers is added that of making 'all laws which shall be necessary and proper, for carrying into execution the foregoing powers' . . . . To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable . . . . . The result of the most careful and attentive consideration bestowed upon this clause is that if it does not enlarge, it cannot be construed to restrain the powers of the Congress, or to impair the right of the Legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble."

"We admit, as all must admit, that the powers of the Government are limited and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

It will be seen from the above : (i) that the "implied powers" are not by themselves substantive powers intended to achieve some great object of State but are only a means for carrying into effect the great objects for which power has been expressly granted in the first seventeen clauses of Sec. 8 of Art. I of the United States Constitution[4]

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[4] *See* (1869) 19 Law Ed 593 (594) : 9 Wall 41, *United States* v. *De Witt*. (That the Congress has power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, the Constitution expressly declares. But this express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.)

(1819) 4 Law Ed 579 (602) : 4 Wheat 316, *M'Culloch* v. *The State of Maryland*. (In the case of a Government of "enumerated powers" on which vast powers and (ii) that the means employed need not be the only possible means of achieving the end, that is, in other words, it need not be *indispensably necessary* to accomplish the purpose for which power has been expressly granted.[5]

It will be noted that Chief Justice Marshall has not based his views purely on the express provision contained in cl. (18) of Sec. 8, ART. I of the Constitution of the United States, but on the other hand, he has principally based his conclusions on *general reasoning* and has only referred to the express provision in the United States Constitution for showing that the view which he was advocating was not only in consonance with reason and principle but was also in accordance with the express provisions of the Constitution. The question, therefore, arises whether the doctrine expounded by Chief Justice Marshall and developed in the American decisions is applicable to the Indian Constitution.

(b) Principle of incidental powers under Indian Constitution: Comparison with American doctrine.

It has already been seen that the entries in the legislative lists in the Constitution must be given a broad and comprehensive interpretation and must not be interpreted in a narrow and pedantic sense. It has further been seen that the entries in the legislative lists are to be interpreted as wide enough to include ancillary and subsidiary matters pertaining to the respective subjects of legislation enumerated in the lists. It has also been seen that in determining the constitutionality of any piece of legislation from the point of view of jurisdiction of the particular Legislature, as regards the subject-matter of legislation, Courts must concentrate on the pith and substance of the legislation and where in pith and substance the legislation falls within the ambit of the legislative field marked out for a particular Legislature, the legislation will be valid, notwithstanding that it may incidentally encroach upon the legislative field of another Legislature. Thus, the principle of *incidental* powers, that is, the principle that where a power has been granted to the Legislature to enact laws on a particular subject, the power carries with it by implication the power to legislate on incidental matters, has been recognised under

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have been conferred, it can never be pretended that these vast powers draw after them others of *inferior* importance, merely because they are inferior. But it can be assumed that ample means for execution of the vast powers conferred have also been granted.)

[5] (1869) 19 Law Ed 513 (523) : 8 Wall 603 (613, 615, 618, 622), *Hepburn* v. *Griswold*. (Congress has unrestricted choice of means, though not absolutely necessary, if appropriate, plainly adapted and really calculated to the ends of the Constitution, in addition to power expressly granted but the power does not extend to anything not within this description, nor to anything prohibited by or inconsistent with the spirit of the constitution.)

(1804) 2 Law Ed 304 (317) : 2 Cranch 358, *United States* v. *Fisher*. (Congress has choice of means.)

the Indian Constitution also. This is a general principle of English law also and has been applied to the interpretation of the Canadian Constitution also. In fact, the doctrine of pith and substance and incidental encroachment is a product of Canadian Constitutional jurisprudence, which has been held applicable to the interpretation of the Government of India Act, 1935, and the present Constitution.

Thus, both the American doctrine of implied powers and the doctrine of incidental powers which has been held applicable to the interpretation of the entries in the legislative lists in the Indian Constitution as well as to the provisions as to fields of legislative powers in the Canadian Constitution are based on the same principle, namely, that the powers in question, though not expressly granted by the Constitution, may be derived by implication from those that have been expressly granted, on the broad principle that a grant of power to do anything implies the grant of power to do everything necessary for the effectual exercise of that power.[6]

(c) Points of difference between American and Indian principles.

But in spite of the above similarity between the American doctrine of implied powers and the principle of incidental powers under the Indian Constitution, the way in which the American doctrine has been developed is peculiarly American and has not been copied under the Indian Constitution. There are three main points of difference between the two principles :

(d) Wide sweep of the doctrine in America.

(i) The first relates to the extremely wide sweep of the power that is annexed to the Congress under the doctrine of implied powers. The extent to which the power of the Congress has been widened by the application of the doctrine of implied powers can be seen from the quotation from Prof. Willis' book on the CONSTITUTIONAL LAW OF THE UNITED STATES, which has already been given above. The widening effect of the application of the principle of incidental power has comparatively been much less than that of the American doctrine of implied powers. The reason for this is that the Indian Constitution is one of double enumeration of powers. That is, in other words, the Indian Constitution is one in which not only the powers of the

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6. (1905) 1905 App Cas 21 (29) : 91 L T 668, *Rossi* v. *Edinburgh Corporation.* (Lord Halsbury, L. C.—Merely because Magistrates are given power to restrict within certain hours sale of ice-cream, it does not necessarily follow that they have implied power to do all that might be desirable or expedient with reference to the times and circumstances under which ice-cream shall be sold.)

[*See* (1881) 10 App Cas 119 (129), *Small* v. *Smith.* ("When you have got a main purpose expressed and ample authority given to effectuate that main purpose, things which are incidental to it and which may reasonably and properly be done and against which no express prohibition is found, may and ought *prima facie* to follow from the authority for effectuating the main purpose by proper and general means" : *Attorney-General* v. *Great Eastern Railway Co.*, (1880) 5 App Cas 473, *Foll.*)

Craies on Statute Law, Fifth Edition, 1952, p. 239.]

Federal Legislature but also those of the State Legislature have been enumerated in the respective legislative lists, and the principle of incidental powers is applicable to the legislative powers of both the Legislatures. It has been seen in NOTE 8 that the entries in the legislative lists must be constured in such a way as to reconcile the powers of both the Central and State Legislatures. This necessarily involves that the powers of the Central Legislature cannot be expanded to their amplest magnitude. In direct contrast with this situation is the situation under the American Constitution. Under that Constitution the powers of the State Legislatures have not been enumerated. It is only the powers of the Congress that have been enumerated. And this has been done in a few brief clauses, namely, the first seventeen clauses of Sec. 8 of ART. I. There is nothing of the elaborateness and attempt at exhaustiveness seen in the enumeration of the legislative powers of the Legislatures under the Indian Constitution. The residuary legislative authority has been conferred on the State Legislatures. Thus, under the American Constitution we have on the one hand a central national Legislature whose powers are defined by the Constitution and, on the other, State Legislatures with undefined legislative powers. Hence the tendency to increase the area of the defined and minimise that of the undefined. Such a tendency is natural. In *Ramkrishna Ramnath* v. *Secretary, Municipal Committee, Kamptee,*[7] Kania C. J. observed as follows :

> "It is natural enough, when considering the ambit of an express power in relation to an unspecified residuary power, to give a broad interpretation to the former at the expense of the latter. The case, however, is different where as in the Constitution Act there are two complementary powers, each expressed in precise and definite terms. There can be no reason in such a case for giving a broader interpretation to one power rather than to the other."

There is also the further fact that the necessities of national development in the different departments of life required a national Government with strong and wide powers. Hence, the Supreme Court of America availed itself of the meagre and non-detailed character of the provisions of the Constitution relating to the distribution of legislative power between the Centre and the States to accord to the Centre more and more wide powers on the ground of their being necessary and proper for carrying out the powers expressly conferred and being, therefore, implied in such powers.[8] Thus, the double enumeration of powers under the Indian Constitution has, on the one hand, operated as a check and a limitation on the powers of Parliament in order to leave sufficient scope for the State Legislatures to function within their allotted orbits, and, on the other, has removed the incentive for expanding the power of the Centre at the expense of the States.

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[7] 1950 S C 11 (13) [AIR V 37 C 4] : 1950 S C R 15 (S C).

[8] At the same time, the doctrine of implied prohibition was developed to safeguard central authority from State interference. See Note 13.

It may also be added that the vesting of residuary powers in the Parliament under Art. 248 removes the need for expanding the powers of the Central Legislature (if, in the interests of national development, it should be considered desirable to have a strong Central Government with wide powers) by resort to the principle of incidental powers.

(e) American doctrine covers independent laws and not merely incidental provisions.

(ii) The second point of difference relates to the fact that while the American doctrine of implied powers has enabled the American Supreme Court to uphold the validity of substantive independent laws passed by the Congress and not merely incidental provisions of laws which in pith and substance were covered by the express powers, the principle of incidental powers under the Indian Constitution has only been resorted to and regarded as available where the legislation in question falls in pith and substance within the legislative field of the particular Legislature.

As seen in NOTE 9, the incidental encroachment on the legislative field of another Legislature which is tolerated and held valid according to the doctrine of pith and substance is based on the fact that the core of the impugned legislation falls within the legislative field of the particular Legislature which has passed it. This has been specifically pointed out by Das J. in *State of Bombay* v. *Narottam Das.*[9] In other words, before the principle of incidental powers can be invoked, there must be a legislation which, in pith and substance, falls within the legislative field of the particular Legislature. It is as forming an integral part of such a legislation that the incidental provisions are held valid. If the "incidentalia" constituted an independent substantive enactment, such an enactment would clearly be *ultra vires*, although the subject-matter may be said to be incidental to a matter covered by the legislative lists pertaining to the Legislature which has passed the Act. In other words, the determining factor under Indian Constitution, as under the Canadian, is whether the pith and substance of the subject-matter of the legislation is covered by the legislative field of the particluar Legislature and not whether certain provisions relate to a matter which is incidental to a matter within the legislative jurisdiction of the particular Legislature.

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[9] 1951 S C 69 (96) (Pr 93) [AIR V 38 C 10] : 1951 S C R 51 (SC).

A reference to the foot-note remarks added to the cases cited in NOTES 9 and 14 in connection with the propositions which say that a broad and comprehensive meaning should be attributed to the legislative entries so as to validate incidental provisions contained in an enactment which in pith and substance are covered by legislative field of the particular Legislature, will show that in each and every case the provisions upheld on the ground of their relating to incidental matter are provisions forming part and parcel of legislation which in its core is covered by the legislative field of the particular Legislature and do not constitute independent, substantive enactments.

Thus, the principle of incidental powers, recognized under the Indian Constitution, does not validate an independent, substantive enactment, the subject-matter of which does not directly fall within the legislative field of the particular Legislature, merely because such subject-matter is incidental to a matter within the legislative field of the particular Legislature. But according to the American doctrine of implied powers the Congress is held to be competent to pass laws which are necessary and proper for carrying out the powers expressly enumerated and it is not necessary that such laws must be part and parcel of any law which is directly covered by the express provisions specifying the matters within the legislative competence of the Congress. Thus, in *M'Culloch* v. *The State of Maryland*,[10] the question before the Supreme Court was not about the validity of certain provisions, which formed part and parcel of an enactment which in the main and in pith and substance, was covered by the matters expressly allocated to the Congress for the exercise of its legislative power. The Act in question was a substantive, independent Act and although its subject-matter was not expressly covered by any of the powers granted to the Congress, its validity was upheld by the Supreme Court on the ground that the law was necessary and proper for carrying out the powers expressly granted to the Congress. The law in question was an Act for the incorporation of the Bank of the United States, and its validity was upheld on the ground that it was necessary and proper for carrying out the great powers conferred on the Federation, such as the powers to lay and collect taxes, to borrow money, to regulate commerce, etc.

(f) American doctrine applies only to Congress and not to those of State Legislatures.

(iii) The American doctrine of implied powers is only applicable to the Congress, inasmuch as it is only the powers of the Congress that have been defined by the Constitution and not those of the States, while the principle of incidental powers is under the Indian Constitution applicable to both the Central and State Legislatures.

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[10] (1819) 4 Law Ed 579 (696) : 4 Wheat 316.

(g) Distinction between powers of legislation and topics of legislation — The American approach and the Indian approach.

It has been mentioned above that in the setting of the Indian Constitution, by reason of the detailed *double enumeration of powers*, the application of the principle of incidental powers to the Indian Constitution has not resulted in such a phenomenal expansion of the scope of the legislative fields allotted to the respective Legislatures, as the application of the doctrine of implied powers has done in the case of the legislative powers of the American Congress. It would appear that the task of the Supreme Court in enlarging the legislative powers of the Congress by the application of the doctrine of implied powers has been facilitated by the *form* in which the Constitution of America defines the legislative powers of the Congress. This form is, it is submitted, in marked distinction from the form in which legislative powers have been distributed between the Central and Provincial Legislatures, not only in the Indian Constitution or the Government of India Act of 1935 but also in the Canadian and Australian Constitutions. In these latter Constitutions, the distribution is by naming the *topics of legislation* allotted to the respective Legislatures and by providing that they can make laws in respect to or in relation to named topics. But the form chosen in the American Constitution for demarcating the legislative field of the Congress is by naming a number of *powers* which the Congress can exercise, as for instance, that the Congress shall have power to lay and collect taxes, to pay debts and to do so many other things which are enumerated in ART. I, Sect. 8, cls. (1) to (17). The final clause (18) gives the Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Although Chief Justice Marshall in *M'Culloch* v. *The State Maryland*[11] rejected the argument that the law-making power is conferred on the Congress only by the eighteenth clause above referred to and that there was no law-making power as such under the previous clauses which only conferred powers to do the various things named therein, and although he held that all the clauses of Section 8 conferred the power of making laws in spite of the form in which those clauses were couched, yet it is conceived and it is submitted that the angle of view for judging the constitutionality of legislation under ART. I, Sect. 8 of the Constitution of the United States is not exactly the same as that under this article or under S. 100 of the Government of India Act or under the Canadian or Australian Constitution. Under the American Constitution, legislation by the Congress has to be viewed as a means to an end, and especially in view of the wide power expressly conferred by cl. (18) of S. 8, these means may cover a wide ground. But under the Indian Constitution, the constitutionality of legislation depends upon the question whether it is with respect to a named *topic*. In other words, in order to uphold the validity of the legislation it must be reasonably possible to say that in truth and substance, the subject-matter of the legislation is covered by the topic in the particular legislative list. It has been aptly observed that the entries in the legislative lists are not *powers* of legislation but *fields* of legislation.[12] (See also NOTE 15.) Thus, under the Indian Constitution, the question that arises for consideration, when the validity of a legislative enactment is attacked on the ground of its falling outside the legislative field allotted to the particular Legislature, is, "what is the subject-matter of legislation?"[13] and whether that subject-matter is covered by the topic mentioned in the particular legislative list. But in a similar contingency, the question with regard to an Act passed by the American Congress would be whether it serves to accomplish the purpose for which the particular legislative power has been conferred on the Congress, the choice of means being left entirely to the Congress. It seems that there is a real difference between the *subject* of a legislation and the *object* of a legislation. While the American Constitution focusses attention on the object of the legislation, the Indian Constitution directs attention to the subject-matter of legislation. It is submitted that when the validity of a piece of legislation is tested from the point of view of whether it subserves a certain purpose or promotes or achieves a certain object, it can cover a much wider ground than when its validity depends upon the subject-matter being of a certain description.

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[11] (1819) 4 Law Ed 579 (605) : 4 Wheat 316.

It is submitted that if the question is considered in this way, it would be conducive to a better understanding of the American doctrine of implied powers and why it is not applicable to the Indian Constitution.

(h) Illustration of above.

A typical illustration of the approach of the Indian Courts to the question whether an enactment falls within the legislative field of the particular Legislature is furnished by the decision of the Supreme Court in *Rajahmundry Electric Supply Corporation* v. *The State of Andhra.*[14] In that case, the validity of the Madras Electricity Supply Undertakings (Acquisition) Act, 43 of 1949, was impeached on the ground of the Act being *ultra vires* the Provincial Legislature under the Government of India Act, 1935. The question was whether the Act fell under the head 'Electricity' in Item 31 of the Concurrent List in the Government of India Act, 1935. It was held by the Supreme Court that the Act was not covered by Item 31, and that an Act for the acquisition of electric undertakings cannot be said to be an Act with respect to 'Electricity'. The way in which the question was approached by the Supreme Court is instructive and it is typical of the difference between the Indian approach and what may be called the American approach (when considering the validity of legislation by the Congress). According to the American doctrine the legislation would probably be held to be covered by the entry, as being conducive to the supply of electricity at cheap rates to the public. But to view the question like this would be to consider not the *subject-matter* of legislation but the consequences of the legislation as the primary factor. As seen in NOTE 8, there is a difference between the *subject-matter* of legislation and the consequences of legislation. The Indian point of view emphasizes the subject-matter of legislation, while the American point of view, in the case of Congress, would seem to attach importance to the consequence of the legislation, its beneficial effects and so on. Thus, in the above case the Supreme Court mainly addressed itself to the question what in pith and substance was the subject of legislation. The Supreme Court points attention to the title of the Act which was "An Act to make provision for the acquisition of undertakings in the Province of Madras, supplying electricity." Then reference is made to the Preamble which recited the expediency of making provision for the acquisition of undertakings in the Province of Madras, engaged in supplying electricity. Then there is a summary of the provisions of the Act, and the conclusion is set forth as follows :

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[12] 1952 All 88 (89) [A I R V 39 C 29] (DB), *Mt. Govindi* v. *State of Uttar Pradesh.*

[13] 1941 F C 16 (35) [A I R V 28] (F C), *United Provinces* v. *Atiqa Begum.* (*Sulaiman J.* — It is not enough that the law in its *working* should somehow overreach that subject. It has to be seen whether it is appertaining to such matter *substantially and directly* and not only whether it would in actual operation affect any such matters in an indirect way.)

1942 Cal 429 (433) [A I R V 29] (DB), *Satish Chandra* v. *Sudhir Krishna.* (What has to be determined in each case is the subject of the legislation and not what things or operations it may indirectly affect.)

[14] 1954 S C 251 (253) (Pr 8) [AIR V 41 C 55] : 1954 S C R 779 (SC).

> "From the above summary it will be noticed that the Act does not purport to make any provision for the granting of licenses or maintenance of works for generating or transmitting energy or for supplying electrical energy as one would expect to find in a law dealing with electricity, nor does the Act purport to make any provision for the incorporation, regulation or winding up of trading corporations. On the contrary, it is abundantly clear from the long title, the Preamble and the sections that it is, in pith and substance, nothing but an Act to provide for the acquisition of electrical undertakings."

On this view, it was held that the impugned Act was not covered by the topic "Electricity" in ITEM 31 in the Concurrent List of the Government of India Act.

It was also held by the Supreme Court in the above case that the impugned Act was not covered by ITEM 9 in LIST II of the

Government of India Act, which authorised the Provincial Legislature to make law with respect to compulsory acquisition of *land.* It was pointed out that there was no entry in any of the three lists relating to compulsory acquisition of any commercial or industrial undertaking. The matter, therefore, related to the residuary power falling under S. 104 of the Government of India Act, 1935, and as the Governor-General had not, in the exercise of his discretionary power under that section, authorised the Madras Legislature to enact the impugned Act, the Act was beyond the legislative competence of the Madras Legislature.

It is interesting to note that in the above case an argument based upon the theory of implied powers was expressly advanced by the Advocate-General of Madras, who urged that there was implicit in every entry in the legislative list in the Seventh Schedule of the Government of India Act of 1935 an inherent power to make a law with respect to a matter ancillary or incidental to the subject-matter of each entry. His argument was that each entry in the list carried with it an inherent power to provide for the compulsory acquisition of any property, land or any commercial or industrial undertaking while making a law under such entry. The Supreme Court in meeting this contention conceded that the powers of each Legislature to make laws with respect to the different subjects assigned to it by the appropriate lists were to be regarded as wide and plenary and also covering matters incidental and ancillary to such subject-matter. But the Supreme Court held on a consideration of the scheme and provisions of the Government of India Act that the power to make a law for compulsory acquisition was, under Entry 9, LIST 2, given only to *Provincial Legislatures* and that such power of the Provincial Legislature was, under that entry, limited to making a law for the compulsory acquisition of *land* only, and that, unless the Governor-General made an order under S. 104 of the Act, the Provincial Legislatures had no power to make a law for the compulsory acquisition of any property other than land and the Federal Legislature had no power to make any law with respect to the compulsory acquisition of *any property* at all.

This shows that the operation of the principle of incidental or ancillary powers to be deduced by implication from legislative entries is subject to limitations imposed by a consideration of other legislative entries and other provisions of the Constitution. It has already been remarked above that the principle of incidental powers has, under the Indian Constitution, a more limited operation as a result of the elaborate and exhaustive double enumeration of legislative powers of both the Central and the State Legislatures which necessarily circumscribe the bounds of each other. This view receives support from the reasoning of the Supreme Court.

It may be mentioned that there is also another answer to the above-mentioned argument of the Advocate-General of Madras in the Supreme Court case under discussion. It is this. His argument (as given in the judgment) only was that each entry in the list carried with it an inherent power to provide for the compulsory acquisition of any property, land or any commercial or industrial undertaking, *while making a law under such entry*. In other words, even according to his argument, unless the impugned law came under a particular entry there would be no question of any incidental or ancillary powers. But in the case on hand, as stated already, the Supreme Court had shown that the impugned legislation was in pith and substance *not* covered at all by the legislative entry under which the incidental power was said to fall. So there could be no question of any 'incidental powers' under such circumstances, according to the view followed in regard to the Indian Constitution. It has been explained already how there is an important difference in this respect between the theory of incidental powers as applied to fields of legislative power under the Indian Constitution and the American doctrine of implied powers as applied to the legislative powers of the Congress of the United States. Under the Indian Constitution, the theory of incidental powers postulates in every case the existence of a legislation which in pith and substance falls under the legislative topic to which the impugned provision is said to be incidental or ancillary, and the 'incidental matters' cannot form by themselves the subject of an independent, substantive enactment, while under the American doctrine of implied powers, the ancillary and subsidiary matter can by itself form the subject-matter of independent substantive legislation.

But so far as the power of compulsorily acquiring any property including land or any commercial or industrial undertaking is concerned, it must now be regarded as a settled law in view of the above decision of the Supreme Court that such power can be only exercised if it directly arises under an express legislative entry and cannot be derived by implication as an incidental and ancillary power pertaining to the matter in any legislative entry.

(i) The characteristic feature of the Indian approach.

The principles as to the interpretation of entries in the legislative lists and the scope of legislative power conferred by them, discussed in NOTES 8, 9, 14 and 15, and the authorities cited in support of those principles, will amply bear out the view set forth in the above discussion as to what may be called the characteristic feature of the Indian manner of approach to the question whether a particular piece of legislation falls within the scope of the allotted sphere of legislative authority of the Legislature which has passed it. It is not necessary to repeat here the discussion and the cases in those Notes.

(j) Principle of incidental powers under Canadian and Australian Constitutions.

A brief reference to the principle of incidental powers as applied under the Canadian and Australian Constitutions will be useful here.

(k) The Canadian Constitution.

The Canadian Constitution, like the Indian Constitution, is one of double enumeration of powers, and there is also no express provision for the conferment of ancillary powers on the Central Legislature similar to ART. 1, SEC. 8 of the American Constitution. But the principle of incidental powers has been recognized under the Canadian Constitution also.[15] This principle was enunciated by Lord Tomlin in *Attorney-General for Canada* v. *Attorney-General for British Columbia*[16] as follows :

> "It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the Provincial Legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in S. 91 (British North America Act, 1867)."

Although his Lordship has referred only to the Dominion Parliament in the particular passage, the principle is a general one and applicable also to Provincial Legislatures under the Canadian Constitution, as can be seen from NOTE 9. In *Cushing* v. *Dupuy*[17] the question was about the validity of the Canadian Insolvent Act passed by the Dominion Parliament of Canada providing that judgment of the Court of Appeal in matters of insolvency should be final, that is, not subject to appeal as of right to Her Majesty in Council allowed by the Civil Procedure Code. Under the Canadian Constitution, "bankruptcy and insolvency" were Dominion subjects, while "property, civil rights and civil procedure" were Provincial subjects. In upholding the validity of the Act, the Privy Council (Sir Montagu E. Smith) observed as follows :

> "It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some mode of special procedure for the vesting, realisation, and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law

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[15] (1930) 99 L J P C 20 (23) : 1930 App Cas 111, *Attorney-General for Canada* v. *Attorney-General for British Columbia.*

(1894) 1894 App Cas 189 (200, 201) : 63 L J P C 59, *Attorney-General of Ontario* v. *Attorney-General for Dominion of Canada.*

(1880) 5 App Cas 409 (415) : 49 L J P C 63 (PC), *Cushing* v. *Dupuy.*

[16] (1930) 99 L J P C 20 (23) : 1930 App Cas 111.

[17] (1880) 5 App Cas 409 (415) : 49 L J P C 63 (PC).

dealing with insolvency. It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the Provinces, so far as a general law relating to those subjects might affect them. Their Lordships therefore think that the Parliament of Canada would not infringe the exclusive powers given to the Provincial Legislatures, by enacting that the judgment of the Court of Queen's Bench in matters of insolvency should be final, and not subject to the appeal as of right to Her Majesty in Council allowed by ART. 1178 of the Code of Civil Procedure."

So also, in *Attorney-General for Ontario* v. *Attorney-General for Dominion of Canada*,[18] the Privy Council, while holding that a law relating to purely voluntary assignments by a debtor passed by the Provincial Legislature did not fall within the legislative head "bankruptcy and insolvency" which was a Dominion subject, inasmuch as compulsiveness is the hallmark of bankruptcy law, held that provisions as to voluntary assignments by the debtor were ancillary to bankruptcy law and might legitimately form part of bankruptcy law if and when enacted by the Dominion Parliament.

(l) The Australian Constitution.

As regards the Australian Constitution, as seen in NOTE 1, it follows the American model under which the Central Legislature is one of enumerated powers and the residuary authority is vested in the States, which have also concurrent power, subject to certain exceptions, with regard to matters over which the Central Legislature has been given the law-making authority. Section 51, cls. (1) to (38) of the Commonwealth of Australia Constitution Act, 1900, enumerate the matters assigned to the Central Legislature and clause (39), like ART. I, SEC. 8, cl. (18) of the American Constitution, expressly adds as the last item "matters incidental to the execution of any power vested by the Constitution in the Parliament."

Under the Australian Constitution also the principle of incidental powers has been applied so as to enlarge the ambit of the field of legislative power assigned to the Australian Parliament. Thus, under cl. (35) of S. 51, above referred to, "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State" is a matter on which the Australian Parliament can legislate. It was held by the High Court in *Stemp* v. *Australian Glass Manufacturers Co. Ltd.*[19] that the prohibition in the Commonwealth Conciliation and Arbitration Act, 1904-1915, S. 6 (1), against doing anything in the nature of a "lock out" or "strike", as these terms were defined by S. 4 of the Act, was within the legislative powers of the Parliament of the Commonwealth conferred by cls. (35) and (39) of S. 51 of the Constitution Act above referred to.

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[18] (1894) 1894 App Cas 189 (200, 201) : 63 L J P C 59.
[19] (1917) 23 C L R 226 (Aus.)

(m) Under Canadian and Australian Constitutions, doctrine of incidental powers resorted to for enlarging the legislative powers, only where in pith and substance the law falls within the legislative field of the Legislature.

Although the principle of incidental powers for the purpose of enlarging the legislative field allotted to a Legislature under a Constitution, has thus been recognized with reference to both the Canadian and Australian Constitutions, yet, it must be noted that the principle has been held to apply only to incidental or ancillary provisions forming part of an enactment which, otherwise, in pith and substance, is covered by the topic to which the impugned provisions are said to be incidental. This is clear from the decision of the Privy Council in *Attorney-General for the Commonwealth of Australia* v. *The Colonial Sugar Refining Co. Ltd.*[20] and from the observations of Lord Haldane in that case. In that case, the question was about the validity of the Royal Commissions Act (1902-1912) passed by the Parliament of Australia. That Act purported to give to Royal Commissions issued under Letters Patent to make any inquiry, power to summon persons to give evidence and to produce documents and impose penalties for failure to obey summons. It was held by the Privy Council that the Act was *ultra vires* and invalid, so far as it purported to enable a Royal Commission to compel answers generally to questions or to order the production of documents or otherwise to compel compliance by members of the public with its requisitions. The ground of decision was that the subject-matter of the impugned Act was not covered by any of the clauses of S. 51 of the Commonwealth of Australia (Constitution) Act, 1900, already referred to. In the course of his judgment delivered on behalf of the Privy Council, Lord Haldane observed as follows :

> "None of them (the enumerated legislative subjects assigned to the Commonwealth Parliament) relate to that general control over the liberty of the subject which must be shewn to be transferred if it is to be regarded as vested in the Commonwealth. It is of course true that under the section (S. 51) the Commonwealth Parliament may legislate about certain forms of trade, about bounties and statistics, and trading corporations. Such legislation might possibly take the shape of statutes requiring and compelling the giving of information about these subjects specifically. But this is not what the Royal Commissions Acts purport to do. Their scope is not restricted to any particular subject of legislation or inquiry, and no legislation has actually been passed dealing with specific subjects such as those to which their Lordships have referred as matters, to which legislation might have been directed giving sanction to some of the inquiries which the Royal Commissioners are now making ...... And until the Commonwealth

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20. (1914) 1914 App Cas 237 (255, 257) : 83 L J P C 154.

Parliament has entrusted a Royal Commission with the statutory duty to inquire into a specific subject, legislation as to which has been by the Federal Constitution of Australia assigned to the Commonwealth Parliament, that Parliament cannot confer such powers as the Acts in question contain on the footing that they are incidental to inquiries which it may some day direct."

So also, in *Attorney-General for Ontario* v. *Attorney-General for Dominion of Canada*,[21] the Privy Council held that legislation as to purely voluntary assignments by a debtor was *ancillary* to the subject of 'bankruptcy and insolvency' which was a Dominion subject under the Canadian Constitution but was careful to say that "it would be open to the Dominion Parliament to deal with such matters *as part of a bankruptcy law*."

It may also be noted that in *Cushing* v. *Dupuy*[22] in which the Privy Council applied the principle of incidental powers to an Act passed by the Dominion Parliament of Canada, (viz., The Canadian Insolvent Act), the enactment was, in the main, one relating to a Dominion subject, (bankruptcy and insolvency) and the provisions (as to civil procedure which was a Provincial subject) validated by applying the principle of incidental powers only formed *part* of this enactment and did not stand by themselves as an independent piece of legislation.

The same may be said about the Australian case *Stemp* v. *Australian Glass Manufacturers Co. Ltd.*[23] in which also the provisions as to "incidental" matters did not form an independent enactment but only constituted a part and parcel of an Act, the main subject-matter of which was directly within the legislative sphere of the Australian Parliament by which the Act had been passed.

Thus, the principle of incidental powers as applied to the question of areas of legislative powers allotted to the Central Legislatures under the Canadian and Australian Constitutions differs in a material respect from the doctrine of implied powers which has been applied to the legislative powers of the American Congress.

(n) Same principles apply in India as under Canadian and Australian Constitutions.

The principle as applied under the Canadian and Australian Constitutions and that applied under the Indian Constitution in this matter are practically identical.

So also, with regard to what may be called the 'sweep' of the principle, it would appear that the Canadian and Australian Constitutions bear a closer resemblance to the Indian Constitution than the American one in this matter. In the first place, under both the

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[21] (1894) 1894 App Cas 189 (200, 201) : 63 L J P C 59.
[22] (1880) 5 App Cas 409 (415) : 49 L J P C 63.
[23] (1917) 23 C L R 226 (Aus).

Canadian and Australian Constitutions, as under the Indian Constitution, the question for consideration when an enactment is attacked as falling outside the legislative field of the particular Legislature is what, in pith and substance, is the subject of legislation[24] and not whether the legislation can be reasonably regarded as necessary and proper for carrying into effect *powers* to do certain things, which is the case under the American Constitution. The difference between the two points of view has already been explained above, and it has been pointed out that the latter point of view will give a longer reach to the legislative arm and enable the Legislature to cover a much wider area than it would otherwise be possible.

(o) Recapitulation.

To recapitulate the main points :

(i) The American doctrine of implied powers and the principle of incidental powers applied under the Indian, Australian and Canadian Constitutions with regard to the areas of legislative actions are basically the same. The American doctrine is only based on the principle of incidental powers and the principle of incidental powers under the Indian, Canadian and Australian Constitutions is also based on *implications* of express powers.

(ii) The fundamental principle involved in both the doctrines is that where the Legislature has been expressly given the power to legislate with regard to a certain matter, it can also legislate as to matters which are ancillary and subsidiary to such matters.

(iii) While the American doctrine allows the Congress to legislate on such incidental matters even by way of an independent enactment which only contains such incidental matters, the doctrine as applied under Indian, Canadian and Australian Constitutions will recognize the validity of legislation on incidental matters only where it forms an integral part of an enactment which, in pith and substance, is otherwise covered by the topic to which the "incidental" matters are said to be ancillary or incidental.

(iv) Under the American Constitution, the legislative field of the Congress is expressed in the form of "powers" to do a number of things which are enumerated, while under the Indian, Canadian and Australian Constitutions, the legislative fields are expressed as *matters* or topics of legislation. The American method makes it possible to annex to the Congress a larger legislative area than would be possible under the other method referred to above.

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[24] (1930) 99 L J P C 20 (23) : 1930 App Cas 111, *Att. Gen. for Canada* v. *Att.-Gen. for British Columbia.* (Trade processes by which fish when caught are converted into a commodity suitable to be placed upon the market cannot, upon any reasonable principle of construction, be brought within the scope of the subject expressed by the words "Sea Coast and Inland Fisheries," one of the subjects mentioned in S. 91 of the British North America Act, 1867, as coming within the exclusive legislative authority of the Parliament of Canada. Decision of S. C. of Canada (1928) S C R 457, *affirmed.*)

(v) The Indian and Canadian Constitutions are Constitutions of double enumeration of powers in which the legislative fields of both the Central and Provincial Legislatures have been demarcated. This necessarily means that the powers of the Centre cannot be allowed to have indefinite expansion as under the American Constitution, but must necessarily be curtailed by the powers of the States. (See NOTE 8.) This is another reason why the principle of incidental powers cannot have the same far-reaching effects as under the American Constitution with regard to the powers of the Congress.

(vi) Under ART. 248, the residuary legislative powers are vested in the Parliament. This obviates the necessity for expanding the powers of the Centre in the interests of a strong national Government by resort to the doctrine of implied or incidental powers, which was the main urge behind the American Supreme Court in its aim of expanding the powers of the Congress.

(vii) The American doctrine of implied powers applies only to the Congress (the Central Legislature), while the principle of incidental powers applies to both the Central and State Legislatures under the Indian Constitution.

17. Doctrine of incidental powers :— See NOTE 16. See also NOTES 9, 14 and 15.

18. Doctrine of implied prohibitions :—See NOTE 13.

19. Taxing clauses. — Where the Legislature requires special revenue for the purpose of carrying out the scheme embodied in a particular legislation, it can insert a taxing clause in the legislation itself and an independent taxing enactment is not necessary.[1]

20. Concurrent List. — A separate Concurrent List of legislative powers is a peculiarity of the Indian Constitution. Although the Canadian Constitution is also based on a double enumeration of powers, that is, a separate enumeration of powers of both the Dominion and Provincial Legislatures, there is no separate list of concurrent powers, that is, of matters upon which both the Dominion and Provincial Legislatures have power of legislation.

Under the American and Australian Constitutions, the Central Legislature is one of enumerated powers and the residuary authority is vested in the units. But with exceptions, the powers assigned to the Central Legislature are concurrent and not exclusive. (See NOTE 1.)

Article 246 — Note 19

[1] *See* 1942 All 156 (162) [A I R V 29] : 43 Cri L Jour 674, *Emperor* v. *Munnalal* (U. P. Sugar Cane Factories Act (1 of 1938) in introducing taxing clauses is not unconstitutional. (Case under Government of India Act, 1935.))

When a matter falls both under the Concurrent List and the Union List, it will be deemed to be exclusively Union subject. But where a matter falls both under the Concurrent List and the State List, the State Legislature will have no similar preference and in spite of the overlapping the matter will be treated as a concurrent subject. In case of conflict between a Union law and a State law on a concurrent subject, the Union law will prevail. (See ART. 254.)

Concurrent power is not a joint power in the sense that it can only be exercised by the joint action of both Central and State Legislatures. In other words, a concurrent subject does not mean that there must be a concurrent action both by the Centre and the State in order to bring into existence any legislation thereon. Nor is there any division of subject-matter between the Centre and the States in such a case.

Under the American Constitution, 18th Amendment, cl. (1), the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States for beverage purposes is prohibited. Under cl. (2), the Congress and the several States have concurrent power to enforce the article by appropriate legislation. With reference to the above provision it has been held that the concurrent power mentioned therein does not mean a joint power. Nor does it require that legislation thereunder by Congress to be effective shall be approved or sanctioned by the States. Nor does it mean that the power to enforce the article is divided between the Congress and several States along the lines which separate and distinguish foreign and inter-State commerce from intra-State affairs.[1]

A provision with respect to a concurrent subject can be contained in an Act with respect to a non-concurrent subject. Thus, an amendment of an Act pertaining to a concurrent subject, say Criminal Procedure (SCH. VII, LIST, 3 Entry 2), may be contained in a Central Act with respect to a subject in the Union List, (e.g.) Elections to Parliament and State Legislatures (Sch. VII, LIST 1, Entry 72). Such amendment will be equally applicable to matters arising under State Acts relating to matters in the State List.[2] See also NOTE 10.

Article 246 — Note 20

[1] (1920) 253 U S 350 (387, 389) : 64 Law Ed 947, *Rhode Island* v. *Palmer*. [*See also* (1922) 67 Law Ed 314 (318) : 260 U S 377 (385), *United States* v. *Lanza*. (In the absence of special provision *by Congress* conviction and punishment in a State Court under a State law for making, transporting and selling intoxicating liquors is not a bar to a prosecution in a Court of the United States under the *Federal law* for the same acts.)]

[2] 1954 Mad 704 (705) (Pr 2) [AIR V 41 C 234] : 1954 Cri L Jour 1126. *Mohammad Sheriff* v. *Mohammad Ibrahim*. (It is open to the Parliament to amend the Criminal Procedure Code, though the State also may introduce its

21. Laws for territories not included in Part A or Part B States. — Under ART. 245 (1), the legislative jurisdiction of the Parliament, in its territorial aspect, extends to the whole or any part of the territory of India, including the territory which does not form part of any Part A or Part B State. Under this article, however, restrictions have been imposed as to the subjects on which the Union and State Legislatures can respectively legislate. With regard to matters which fall within the Union and Concurrent Lists, Parliament has the exclusive power of legislation. With regard to matters which fall exclusively in State List, the Parliament has no legislative power and it is only the State Legislatures that can legislate on such matters. But the State Legislatures referred to here are only Legislatures of Part A and Part B States. The jurisdiction of these State Legislatures extends only to the territories of the respective States. So, outside the territories of Part A and Part B States, the Legislatures of these States have no jurisdiction. The legislative authority for territories outside Part A and Part B States in regard to *all* matters including those enumerated in the State List is vested under clause (4) of this article in the Parliament. The clause corresponds to S. 100, cl. (4) of the Government of India Act, 1935. As under this Constitution residuary power also is vested in the Parliament (ART. 248), while under the Government of India Act, S. 104, residuary power was to be exercised either by the Central Legislature or Provincial Legislature, as the Governor-General might decide in particular case, the authority of the Parliament under this clause is wider than that of the Dominion Legislature under S. 100, cl. (4) of the Government of India Act, 1935.[1]

The Constitution directly provides for Legislatures only for Part A and Part B States. (See ARTS. 168 (Part A States) and 238

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own special amendment. For an amendment of the Criminal Procedure Code it is not necessary that an Act as such to amend the Criminal Procedure Code must be introduced. It may be introduced in any of the Acts of Parliament by introducing a suitable provision in that Act. Since the Parliament has power to amend the Criminal Procedure Code and has power to introduce a provision like S. 138, Representation of the People Act (43 of 1951), that section has all the force of amending the Criminal Procedure Code in respect of all offences which fall within the Indian Penal Code. The amendment introduced by S. 138, Representation of the People Act, is quite valid. It will equally apply to offences relating to elections to Parliament and State Legislatures (a Union subject) and offences relating to elections to Panchayat Boards (a State subject.))

Article 246 — Note 21

[1] 1951 S C 332 (432) (Pr 345) [A I R V 38 C 56] : 1951 S C R 747 (SC), *In re Delhi Laws Act, 1912.*

[*See* 1950 Ajmer 26 (Pr 3) [A I R V 37 C 34] : 51 Cri L Jour 1060, *Jagat Singh* v. *Rex.* (The Central Legislature has power under S. 100 (4), G. I. Act to legislate for Ajmer-Merwara which was Chief Commissioner's Province upon matters enumerated in the Provincial List. S. 100 (3) has no application as it is not a Governor's Province.)]

(7) (Part B States)). As regards Part C States, under Art. 240 Parliament has been given the power to create body to function as a Legislature of the State. The constitution, powers and functions of such a body are in each case to be as specified in the law made by the Parliament. This makes the powers of the Legislatures in Part C States, in cases where such Legislatures have been brought into existence, subject always to Parliamentary control unlike the powers of the Legislatures of Part A and Part B States, which cannot be affected by Parliamentary legislation.

The Part C States Laws Act, 1950, is an important instance of Parliamentary legislation about Part C States passed in the exercise of the Parliamentary control under cl. (4) of this article.

22. Residuary power. — Under S. 104 of the Government of India Act, 1935, legislative power in regard to any matter not covered by any of the three legislative lists in the Act could be exercised either by the Dominion Legislature or a Provincial Legislature according as may be decided by the Governor-General in each case. In the absence of such empowerment by the Governor-General legislation on such residuary matter will be *ultra vires*. But under the present Constitution, residuary legislative power in regard to matters not covered by either of the three legislative lists, has been vested exclusively in the Parliament under Art. 248. A State Legislature has no residuary power at all and where a matter does not fall in List 2 or List 3, a State Legislature cannot legislate upon it at all.[1] In such a case, the State Legislature cannot avoid the difficulty by professing to adopt, with modifications, a law made by another Legislature (to wit, the Central Legislature), for it is a well-established principle that what cannot be done directly cannot be done indirectly also.[2]

23. Territorial limits of legislative power.—See Art. 245, Note 15.

Power of Parliament to provide for the establishment of certain additional courts.

247. Notwithstanding anything in this Chapter, Parliament may by law provide for the establishment of any additional courts for the better administration of laws made by Parliament or of any existing law with respect to a matter enumerated in the Union List.

Article 246 — Note 22

[1] 1954 All 728 (734) [AIR V 41 C 289] : ILR (1954) 2 All 191 : 1954 Cri L Jour 1485 (DB), *Durgeshwar* v. *Secretary, Bar Council.*

[2] 1954 All 728 (734) [AIR V 41 C 289] : ILR (1954) 2 All 191 : 1954 Cri L Jour 1485 (DB), *Durgeshwar* v. *Secretary, Bar Council.*

JAMMU AND KASHMIR

This article applies to the State of Jammu and Kashmir.—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954.)

COGNATE PROVISIONS

Existing law—Interpretation of, see Art. 366 (10).
Union List—Meaning of, see Art. 246 (1).

1. Scope of the Article. — This article corresponds to S. 101 of the British North America Act, 1867, which runs as follows :

> "The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance, organization of a general court of appeal for Canada and for the establishment of any additional Courts for the better administration of the laws of Canada".

Under both the Canadian and Indian Constitutions, the dual system of the American Constitution under which there are two sets of Courts, Federal and State, for administration of Federal and State laws respectively has not been adopted. The same set of Courts administer both the systems of law, Federal as well as State. As regards the constitution and organization of Courts under LIST 1, Entries 77 and 78, the Supreme Court and the High Courts are Union subjects, while under LIST 2, Entry 3, the constitution and organization of other Courts are State subjects. Thus, even for the administration of Union laws, the power of legislating as to the constitution and organization of Courts other than the Supreme Court and the High Courts is vested in the State Legislatures according to the legislative entries read with ART. 246. The present article makes an exception to this rule by enabling the Parliament to bring into existence additional Courts for the administration of Union laws and existing laws with reference to matters in the Union List. As to the meaning of existing law, see ART. 366, cl. (10).

The expression "matter enumerated in the Union List" must be understood in the light of ART. 246 under which, if a matter falls both in the Union List and the State List or in the Union List and the Concurrent List, it must be treated as an exclusive Union subject. Further, the principles discussed in the commentary on ART. 246 as to the determination of question in a given case whether the subject-matter of legislation falls in one list or another will also apply in the context of this article and the question whether a matter is to be treated as enumerated in the Union List should be determined in accordance with this principle.

Residuary powers of legislation.

248. (1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

GOVERNMENT OF INDIA ACT, 1935

"**104.** *(1)* The Governor-General may by public notification empower either the Federal Legislature or a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the Lists in the Seventh Schedule to this Act, including a law imposing a tax not mentioned in any such list, and the executive authority of the Federation or of the Province, as the case may be, shall extend to the administration of any law so made, unless the Governor-General otherwise directs.

(2) In the discharge of his functions under this section the Governor-General shall act in his discretion."

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, Art. 248 shall be omitted. — The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISION

Concurrent List or State List — Meaning of—See Art. 246.

"Parliament has exclusive power to make any law"—See also Sch. VII List I Entry 97 which provides "Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists." The following articles of this Constitution may be consulted which empower the Parliament to make law :—

Articles 2, 3, 10, 11, 16 (3), 22 (7), 32 (3), 33, 34, 35, 53 (2), 65 (3), 70, 71 (3), 73 (2), 81 (2) and (3) 82, 83, 84 (c), 98 (2), 101 (1), 102 (1) (e), 105 (3), 106, 112 (3) (g), 116 (1), 119, 120 (2), 124 (1) and (5), 133 (1) (a) and (3), 134 (2), 135, 137, 138 (1) and (2), 139, 140, 142 (2), 145 (1), 146 (2), 148 (3) and (5), 149, 169 (1), 170 (4), 171 (2), (3) (a) (c) and (4), 172, Proviso , 173 (c), 193, 221 (2), 230, 240 (1), 241 (1), 242 (1), 247, 249, 250, 252, 253, 259, 262, 267 (1), 271, 275 (1), 276 (2), Proviso., 280 (2), 283 (1), 285 (1), 286 (2), 287, 289 (2), 293 (2), 300 (1), 302, 303 (2), 307, 309, 312 (1), 315 (2), 320 (5), 321, 324 (2), 326, 327, 341 (2), 342 (2), 343 (3), 348 (1), 353 (b), 357 (1) (b), 367 (3), Proviso., 369, 371, Sch. V, Para. 7 and Sch. VI, Para. 21.

Synopsis

1. Analogous law.
   (a) Government of India Act, 1935.
2. Scope of article.
3. Law imposing tax.
4. Retrospective legislation.

1. Analogous law.—This provision as to the vesting of residuary power in the Centre is similar to that in the British North America Act, 1867, S. 91, under which also the residuary power is vested in the Dominion Parliament of Canada and not in the Provinces. But in the Constitution of the United States as well as that of Australia,[1] residuary power belongs to the States and not to the Centre. (See ART. 246, NOTE 1.)

(a) Government of India Act, 1935.

The provision as to residuary powers in the Government of India Act, 1935, was contained in SEC. 104 of the Act. Under that section, power was given to the Governor-General to empower by public notification either the Dominion Legislature or the Provincial Legislature to legislate on a particular matter which was not covered by any of the three legislative lists. Thus, the residuary legislative power under the Government of India Act, 1935, was not definitely vested either in the Dominion Legislature or in the Provincial Legislature but was practically in the gift of the Governor-General, who could exercise his discretion in each case as it arose, and empower legislation on the particular subject either by the Dominion Legislature or by the Provincial Legislature.

The present article marks a departure from this position and vests the residuary legislative power in the Central Legislature, in every case in which it may be found that the subject-matter of legislation is not covered by any of the three legislative lists.

2. Scope of Article. — As seen in NOTE 1, this article marks a departure from the corresponding S. 104 of the Government of India Act, 1935, in two respects :

(a) The residuary power is not left as it were floating in the air to be exercised either by the Central or Provincial Legislature as some other external authority may decide in a given case. The residuary legislative power now is vested in the Central Legislature once for all and there is no possibility of the power being exercised by a State Legislature as there was under the Government of India Act, 1935.

(b) The Central Legislature is not under the need to obtain the sanction of any extraneous authority in order to initiate legislation on a subject not covered by any of the three legislative lists.[1]

Article 248 — Note 1

[1] (1936) 105 LJ PC 115 (120) : 1936 App Cas 578, *James* v. *Commonwealth of Australia.*

Article 248 — Note 2

[1] 1950 Pat 392 (401) (Pr 6) [AIR V 37 C 108] : ILR 29 Pat 790 (SB), *Kameshwar Singh* v. *Province of Bihar.*

The absence of a notification by the Governor-General authorising legislation under S. 104, Government of India Act, 1935, on a residuary subject meant that the legislation on such subject was *ultra vires*. Thus, before the amendment of List 1 by the insertion of Item 56A and of List 2 by the insertion of Item 53A by the India Estate (Duty) Act, 1945, the Federal Legislature or the Provincial Legislatures had no power (in the absence of notification by the Governor-General under S. 104) to levy estate duty as the subject was not covered by any of the three legislative Lists.[2]

Similarly, it has been held by the Supreme Court[3] that the Madras Electricity Supply Undertakings Requisition Act, 1949, was *ultra vires* the Madras Legislature in the absence of the required notification under S. 104 of the Government of India Act, 1935, inasmuch as the real subject-matter of the Act was the compulsory acquisition of a commercial or industrial undertaking, which was not covered by any of the legislative lists in the Government of India Act and therefore constituted a residuary subject on which the Madras Legislature could not legislate in the absence of a notification by the Governor-General under S. 104. It was held by the Supreme Court on a scrutiny of the provisions of the impugned Act that its subject-matter did not fall under the head 'electricity' in the Concurrent List, Item 31 or Item 9 (compulsory acquisition of land) of the Provincial List. Under the present Constitution it is clear that the subject would be within the exclusive jurisdiction of Parliament as a residuary subject.

Similarly, it was held by the Bombay High Court in *Tan Bug Taim* v. *Collector of Bombay*[4] that LIST, 2 Item 9 (compulsory acquisition of land) would not include the requisitioning of land and as the requisitioning did not form the subject-matter of any of the other entries in the three legislative lists, it came under S. 104 and hence the Provincial Legislature could not deal with the subject in the absence of notification by the Governor-General. The soundness of this view was recognized by the Government impliedly by thereafter issuing a notification under S. 104, empowering Provincial Legislatures to requisition immovable property. Legislation passed thereafter by Provincial Legislatures under the authority of such notification, authorising the requisitioning of such property, was therefore *intra vires*.[5]

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[2] 1944 FC 73 (79) [AIR V 31] (FC), *Powers of Federal Legislature to levy Estate Duty, In the matter of.*

[3] 1954 SC 251 (253) (Prs 7, 8) [AIR V 41 C 55] : 1954 SCR 779 (SC), *Rajahmundry Electricity Supply Corporation Ltd.* v. *State of Andhra.* (AIR 1951 Mad 979, Reversed).

[4] 1946 Bom 216 (233, 234) [AIR V 33 C 59] : ILR (1946) Bom 517 : 47 Cri L Jour 594.

So also, it was held that LIST 1, Item 1 and LIST 2, Item 1 authorised only laws of preventive detention for certain purposes specified therein and hence a law of preventive detention for any other purpose could only be passed on the Governor-General's notification under S. 104, Government of India Act, 1935.[6]

Under the present Constitution, as stated already, no question of being authorised by extraneous authority before legislating on residuary subjects arises.

It has been seen in NOTE 1 that residuary powers are vested in the States under the American and Australian Constitutions. But there is a difference between the sense in which residuary powers are vested in the Indian Parliament under this article and that in which residuary powers are vested in the States under the American Constitution. Under the American Constitution, there is no double enumeration of the powers of the Congress and the States. It is only the powers of the Congress which are enumerated specifically. But under this Constitution there is an elaborate and exhaustive enumeration of the fields of legislation of both the Central and State Legislatures. There is besides a Concurrent List of powers. Although the Canadian Constitution is one of double enumeration of powers, the enumeration is not so exhaustive and elaborate as under this Constitution. Nor is there a Concurrent List. The result of all this is that under this Constitution, there is comparatively very little scope for resort to residuary powers because the Constitution-makers have tried to make the legislative lists as exhaustive and complete as possible and the cases, which are not covered by any of the legislative entries, are bound to be extremely rare.

Under the Government of India Act, 1935, also, there were three legislative lists containing an exhaustive enumeration of the legislative fields of the Federal and Provincial Legislatures, although there was also provision for the exercise of residuary powers under S. 104. It was pointed out with reference to the residuary powers

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5. 1953 Assam 177 (181, 182) (Pr 16) [AIR V 40 C 76] (DB), *Assam Company* v. *State of Assam.*

1951 Nag 33 (35) (Pr 10) [AIR V 38 C 11] : ILR (1951) Nag 791 (DB), *Manohar Ramkrishna* v. *G. G. Desai.* ("Land" held to include buildings).

1949 Bom 93 (95) [AIR V 36 C 29], *Ratanchand Hirachand* v. *D. R. Pradhan.*

6. 1949 All 513 (514) (Pr 8) [AIR V 36 C 189] : ILR (1950) All 615 : 50 Cri L Jour 798 (FB), *Basudeva* v. *Rex.*

1949 Pat 299 (301) (Pr 2) [AIR V 36 C 85] : 50 Cri L Jour 575 (DB), *Lalu Gope* v. *The King.* (Preventive detention as a habitual criminal).

under the Government of India Act, 1935, that the provision of such powers was only by way of caution to cover cases which in spite of the exhaustive enumeration of legislative powers might have been omitted. Hence, it was held that resort to residual powers should be had only as a last refuge.[7] It was observed by Sulaiman, J., in *Subrahmanyan* v. *Muttuswami*[8] that resort to residual power should be the very last refuge. It is only when all the categories in the three lists are absolutely exhausted that one can think of falling back upon the non-descript. This means that the various legislative entries must be given a broad and liberal interpretation so as to include subsidiary and ancillary matters. At the same time, the fact that the entries, taken singly, overlap each other in many cases necessitates their being read together with the result that the very fact that the legislative subject-matter has been so exhaustively catalogued involves that each item is limited and restricted by other items.[9] (See ART. 246, NOTE 8.) Further, although subject only to such limitations as are necessary to give effect to other entries, each legislative entry must be construed in a broad and liberal manner and accorded the widest amplitude, yet they must not be given any forced construction and their scope must not be artificially extended to matters which do not fall within it. It is in this connection that the provision made for residuary powers becomes material, as it necessarily implies that the entries in the legislative lists have been recognized to contain omissions in spite of attempt to make them exhaustive, and that the Constitution does contemplate resort to residuary powers in cases where on a fair construction of the legislative entries they do not cover a particular subject-matter.[10] But when two

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[7] 1941 FC 47 (55) [AIR V 28] (FC), *Subrahmanyan* v. *Muttuswami*. [*See* 1939 FC 1 (5) [AIR V 26] (FC), *In re C. P. Motor Spirit Act*].
[*See also* 1947 PC 72 (74) (Pr 12) [AIR V 34 C 17] : 1947 FCR 77 : 74 Ind App 12 : ILR (1947) Kar (PC) 151 (PC), *Megh Raj* v. *Allah Rakhia*. (Matter covered by Prov. List — No need for Governor-General's Notification under S. 104)].

[8] 1941 FC 47 (55) [AIR V 28] (FC).

[9] 1945 PC 98 (101) [AIR V 32] : 72 Ind App 91 : 1945 FCR 179 : ILR (1945) Kar PC 153 (PC), *Governor General in Council* v. *Madras Province*.

[10] 1954 SC 251 (252, 253) (Prs 6, 7) [AIR V 41 C 55] : 1954 SCR 779 (SC), *Rajahmundry Electric Supply Corporation* v. *State of Andhra*. (Madras Electricity Supply Undertakings (Acquisition) Act, 1949, does not deal with 'Electricity' under Govt. of India Act, 1935, Sch. VII List III Entry 31 nor does it fall under List II Entry 9 'Compulsory acquisition of land' and is therefore *ultra vires* as the Governor-General's notification under S. 104 for legislation on a residuary subject had not been obtained).

1947 FC 1 (6) [AIR V 34 C 1] : 1946 FCR 67 : ILR (1946) Kar (FC) 27 (FC), *Manikkasundara Bhattar* v. *R. S. Nayudu*.

1946 Bom 216 (233, 234) [AIR V 33 C 59] : ILR (1946) Bom 517 : 47 Cri L Jour 594, *Tan Bug Taim* v. *Collector of Bombay*. (Even though constructions are possible, one of which will avoid resort to the residuary power and the other of which will necessitate such resort, the former must be preferred.[11]

The legislative lists in the present Constitution are even more detailed and exhaustive than those in the Government of India Act, 1935. The present LIST 1 contains 97 entries as against 59 in LIST 1 of the Government of India Act. Similarly, LIST 2 contains 66 entries as against 54 in LIST 2 of the Government of India Act and LIST 3 contains 47 entries as against 36 in LIST 3 of the Government of India Act, 1935. Hence, the considerations which made for the very limited resort to the residuary power under the Government of India Act, 1935, apply with all the greater force to the present Constitution. But the same considerations also imply that the legislative entries must be given a natural construction and must not be unduly stretched so as to cover matters which do not fall within their scope on such construction.

This article seems to be practically redundant as the same purpose is also served by Entry 97 in List 1, which runs as follows :

> "Any other matter not enumerated in LIST 2 or LIST 3 including any tax not mentioned in either of those Lists."

The question of residuary powers and whether they should be vested in the Central Legislature or the Provincial Legislature gave rise to much controversy at the time when the Government of India Act, 1935, was passed. Speaking generally, the Hindus wished to keep the predominant power in the Centre and the Moslems wished to keep the predominant power in the Provinces. Hence, the Hindus demanded that the residuary field should remain in the Centre and the Moslems that it should remain in the Provinces. It was in an attempt to reduce these differences that the exhaustive triple legislative lists were deviced, so as to leave "little or nothing for the residuary field". As a further precaution, the question as to which Legislature was to exercise residuary power in a given matter was left to the decision of the Governor-General under S. 104. When the Constituent Assembly first met and the Objectives Resolution was passed, residuary powers were assigned to the Provinces as a concession

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those lists may have been meant to be as exhaustive and comprehensive as human ingenuity could make them, they were meant to comprise all that could be thought of as within the *ordinary* activities of the Government, and are not really exhaustive and, therefore, residuary powers of legislation were vested in the Governor-General under S. 104).

[11] 1947 FC 1 (6) (Pr 9) [AIR V 34 C 1] : 1946 FCR 67 : ILR (1946) Kar (FC) 27 (FC), *Manikkasundara Bhattar* v. *R. S. Nayudu.* (Madras Temple Entry Authorisation and Indemnity Act, 1939, is *intra vires* as falling within Sch. 7 List II entry 34).

to the Muslim point of view, and partly also on an analogy of the American Constitution. But Partition changed the whole complexion of things and strongly impressed the members of the Constituent Assembly with the necessity of having a strong Central Government and hence in the Constitution as finally adopted, the residuary powers are vested in the Centre.

3. **Law imposing tax.**—Where it is contended that a certain contribution levied under an Act passed by the Provincial Legislature is a tax and not a fee and is, as a tax, not covered by the State List or the Concurrent List, the question for consideration is whether the contribution goes to swell the public revenue. If it does not, it would only amount to a fee which would be within the powers of the State Legislature to impose as part of the legislation it makes on a subject in the State List or the Concurrent List.[1]

4. **Retrospective legislation.** — The power of Parliament to make laws on the "residual" matters is as plenary as its power with respect to the enumerated subjects. Hence, the Parliament has full powers to make laws with retrospective effect in regard to residuary matters.[1]

Power of Parliament to legislate with respect to a matter in the State List in the national interest.

249. (1) Notwithstanding anything in the foregoing provisions of this Chapter, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with

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Article 248 — Note 3

[1] 1954 Pat 266 (276) (Pr 20) [AIR V 41 C 93] : ILR 32 Pat 1148 (DB), *Baijayanda Giri* v. *State of Bihar*. (The contribution made under S. 70 of the Bihar Hindu Religious Trusts Act is in the nature of a fee and not in the nature of a tax and the State Legislature was competent to enact this provision. It is true that there is the element of compulsion in the payment of the fee and it is also true that the fee is not uniform and there is no relationship between the amount of the fee and the services rendered. But the main consideration in such a case is whether the contribution goes to swell the public revenue. The contribution imposed under Section 70 does not go to the consolidated fund of the State of Bihar. Under the Act the authorities may be raising revenue from the trustees of religious endowments under S. 70 but the levy is not made for any Government purpose but for the limited specified purpose laid down in S. 70, *viz.*, for the defraying the expenses incurred in the administration of the Act. AIR 1952 Mad 613, *Distinguished;* AIR 1953 Bom 242, *Rel. on*).

Article 248 — Note 4

[1] 1952 Madh-B 181 (186) (Pr 11) [AIR V 39] (DB), *Shanta Devi, Smt.* v. *Custodian, Evacuee Property.*

respect to any matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force.

(2) A resolution passed under clause (1) shall remain in force for such period not exceeding one year as may be specified therein:

Provided that, if and so often as a resolution approving the continuance in force of any such resolution is passed in the manner provided in clause (1), such resolution shall continue in force for a further period of one year from the date on which under this clause it would otherwise have ceased to be in force.

(3) A law made by Parliament which Parliament would not but for the passing of a resolution under clause (1) have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period.

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, ART. 249 shall be omitted. — The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISION

State List—Meaning of, see Art. 246 (3).

Synopsis

1. Analogous law.
    - (a) Government of India Act, 1935.
    - (b) Canada.
2. Scope and object of Arts. 249 to 253.

1. Analogous law. — There was no corresponding provision in the Government of India Act of 1935.

(a) Government of India Act, 1935.

(b) Canada.

The Canadian Constitution is also one of double enumeration of powers like this Constitution. (See ART. 246, NOTE 1.) Under S. 91 of the British North America Act, 1867, are enumerated the exclusive powers of the Parliament of Canada, while the exclusive powers of the Provincial Legislatures in Canada are enumerated in S. 92. In addition to the powers expressly enumerated in S. 91, the Dominion Parliament has also been given under S. 91, the general power to make laws on any matter for the peace, order and good government of Canada,[1] provided that the matter is not covered by any of the subjects exclusively assigned to Provincial Legislatures under S. 92.

In case of overlapping between the powers expressly enumerated in S. 91 and those expressly enumerated in S. 92, the Dominion Parliament is to have the preferential power of legislation and the matter should be treated as lying within the field of the Dominion Parliament. This principle applies only to the powers expressly enumerated in S. 91. In regard to the power of legislation under the residuary power above referred to, namely, the power to legislate for the peace, order and good government of Canada, that power exists (as stated already) only in those cases in which the matter has not been assigned exclusively to Provincial Legislatures under S. 92. The Dominion Parliament of Canada, therefore, has no power to legislate on matters assigned to the Provincial Legislatures under S. 92 except in those cases in which the subject-matter of legislation may also fall under any of the matters expressly enumerated in S. 91.[2]

With regard to matters not covered by the exclusive powers of Provincial Legislatures, the Canadian Parliament may make laws in the national interest although there may be no emergency. The test is only whether the matter is of national importance and not whether there is any *emergency*.[3] But the existence of an emergency like a war may impart to a matter, *prima facie*, falling within the jurisdiction

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Article 249 — Note 1

[1] (1882) 7 App Cas 829 (841, 842) : 51 LJ PC 77, *Russell* v. *The Queen.* (Objects and scope of the Canada Temperance Act (1878) are general, viz., to promote temperance by means of a uniform law throughout the Dominion. The legislation is clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion. In statutes of this kind the legislation is general and the provision for the special application of it to particular places does not alter its character. The Act does not fall within any of the classes of subjects assigned exclusively to the Provincial Legislatures. The legislation is within the legislative competence of the Dominion Parliament.)

[2] (1925) 1925 App Cas 396 (403) : 94 LJ PC 116, *Toronto Electric Commissioners* v. *Snider.*

(1922) 1 App Cas 191 (197, 198) : 91 LJ PC 40, *In re the Board of Commerce Act,* 1919.

(1912) 1912 App Cas 333 (343) : 81 LJ PC 145, *City of Montreal* v. *Montreal Street Railway.*

[3] 1946 PC 83 (90) [AIR V 33 C 31] (PC), *Attorney-General of Ontario* v. *C. T. Federation.*

of the Provinces, a character which takes it out of such jurisdiction and sets the Dominion Parliament free to legislate upon it.[4]

Thus, under the Canadian Constitution, as interpreted by the judicial decisions, even in national emergency the Dominion Parliament is held to have power to legislate on a subject-matter, which *prima facie* falls exclusively within the Provincial field, only by a circuitous process by holding that under the circumstances the matter is not a Provincial subject at all. This article simplifies the whole position by straightway declaring that the Parliament can legislate on matters in the State List when the Council of States passes a resolution by the requisite majority of two-thirds that the legislation by the Parliament on such matter is necessary and expedient in the national interest.

Another point of difference which may be noted as compared with the Canadian Constitution is that under the latter it is left to the Courts to determine whether the matter of legislation by the Dominion Parliament is of national importance and further whether the circumstances connected therewith remove it from the purview of the Provincial field. But under this article, the question whether legislation on a certain matter in the State List is necessary or

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4. (1923) 1923 App Cas 695 (703, 704, 705), *Fort Frances Pulp and Power Company Limited* v. *Manitoba Free Press Company Ltd.* (In normal circumstances the Dominion Parliament could not have legislated so as to set up the machinery of control over the paper manufacturers. Though the Dominion Parliament cannot ordinarily legislate so as to interfere with property and civil rights in the Provinces, in exceptional cases such a power may be implied.)

(1922) 1 App Cas 191 (197, 198) : 91 LJ PC 40, *In re the Board of Commerce Act*, 1919. (It may well be that the subjects of undue combination and hoarding are matters in which the Dominion has a great practical interest. In special circumstances such as those of a great war, such an interest might conceivably become of such paramount and overriding importance as to amount to what lies outside the heads in S. 92 and is not covered by them; but it is quite another matter to say that under normal circumstances general Canadian policy can justify interference, on such a scale, as the statutes in controversy (Combines and Fair Prices Act, 1919) involve, with the property and civil rights of the inhabitants of the Provinces.)

(1896) 1896 App Cas 348 (360, 361) : 65 LJ PC 26, *Attorney-General for Ontario* v. *Attorney-General for the Dominion.* (Some matters, in their origin local and provincial, might attain much dimensions as to affect the body politic of the Dominion and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.)

expedient in national interest is left to be decided by a resolution of Council of States.

2. Scope and object of Arts. 249 to 253. — The purpose of ARTS. 249 to 253 is to create a strong Central Government in spite of the federal framework of the Constitution, so as to promote national solidarity and unity. The method chosen in these articles for this purpose is to empower the Parliament to make laws on matters in State List in certain circumstances. Under this article the Union Parliament gets this special power of legislation in cases in which the Council of States passes a resolution, by a majority of two-thirds of the members present and voting, that legislation by Parliament on a particular subject is necessary or expedient in the national interest. Under ART. 250 the special power of the Parliament to legislate on matters in State List arises in case of proclamation of emergency under ART. 353. Under ART. 252 the basis of the special power is consent of the Legislatures of two or more States expressed in the form of resolutions of the Legislatures. Under ART. 253 the Parliament has power to make any law, irrespective of the allocation of subjects in the legislative lists, for the purpose of implementing treaties, etc., with foreign countries. (ART. 251 deals with question of inconsistency between a Parliamentary law made under ART. 249 or 250 and a State law relating to the same subject.)

The laws made by the Parliament under this article or ART. 250 are of a temporary nature. Under this article, such a law will cease to have effect at the end of six months from the expiry of the resolution of the Council of States. (Thus, the duration of the *law* should not be confused with that of the *resolution.*) As regards the duration of the resolution of the Council of States, such duration is to be fixed by the resolution itself. But the period so fixed cannot in any case exceed at one time one year. But the resolution can be continued in force by similar resolutions for further periods of one year at a time. The expiration of a law made under ART. 250 will not affect anything done or omitted to be done before the expiration.

The resolution passed by the Parliament on 12-8-1950 assuming powers to legislate on trade and commerce is an instance of resolution under this article. The resolution was passed by the Parliament as the new bicameral Legislature had not come into existence and by the President's Order for Removal of Difficulties under ART. 392, this article was suitably amended to enable the Parliament itself to pass the resolution instead of the Council of States.[1]

Article 249 — Note 2

1. 1951 Cal 120 (122) (Prs 17, 18) [AIR V 38 C 30c] : 52 Cri L Jour 934 (FB), *Ramananda* v. *The State.*

In addition to the powers under this article, the Parliament has also been given power under ART. 369 for a period of five years from the commencement of the Constitution, to legislate on trade and commerce within a State and other matters.

Power of Parliament to legislate with respect to any matter in the State List if a Proclamation of Emergency is in operation.

250. (I) Notwithstanding anything in this Chapter, Parliament shall, while a Proclamation of Emergency is in operation, have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List.

(2) A law made by Parliament which Parliament would not but for the issue of a Proclamation of Emergency have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.

GOVERNMENT OF INDIA ACT, 1935.

"**102.** (*1*) Notwithstanding anything in the preceding sections of this chapter, the Federal Legislature shall, if the Governor-General has in his discretion declared by Proclamation (in this Act referred to as a 'Proclamation of Emergency') that a grave emergency exists whereby the security of India is threatened, whether by war or internal disturbance, have power to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List or to make laws, whether or not, for a Province or any part thereof, with respect to any matter not enumerated in any of the Lists in the Seventh Schedule to this Act.

Provided that no Bill or amendment for the purposes aforesaid shall be introduced or moved without the previous sanction of the Governor-General in his discretion, and the Governor-General shall not give his sanction unless it appears to him that the provision proposed to be made is a proper provision in view of the nature of the emergency. . . . . .

(*4*) A law made by the Federal Legislature which that Legislature would not but for the issue of a Proclamation of Emergency have been competent to make [a] [shall, to the extent of the incompetency, cease to have effect] on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period."

(a) Section 5 of the India (Central Government and Legislature) Act, 1946 (9 & 10 Geo VI Ch 39), by which these words are *substituted*, runs as follows :— "A law made by the Indian Legislature whether before or after the passing of this Act, during the continuance in force of the Proclamation of Emergency being a law which that Legislature would not, but for the issue of such a Proclamation, have been competent to make, shall not cease to have effect as required by sub-section (4) of section one hundred and two of the Government of India Act, 1935, except to the extent to which the said Legislature would not, but for the issue of that Proclamation, have been competent to make it, and accordingly, in the said sub-section (4) for the words "shall cease to have effect" there shall be substituted the words "shall, to the extent of the incompetency, cease to have effect."

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in Art. 250, for the words "to any of the matters enumerated in the State List," the words "also to matters not enumerated in the Union List" shall be substituted. — The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISION

Proclamation of Emergency—Interpretation of, see Art. 366 (18).

Synopsis

1. Analogous law.
    (a) Government of India Act, 1935.
    (b) Other Constitutions.
2. Scope of the article.
3. "For the whole or any part of the territory of the Union."
4. Ordinance by President.
5. Clause (2).

1. Analogous law.

(a) Government of India Act, 1935.

(a) Government of India Act, 1935.

This article corresponds to S. 102 of the Government of India Act, 1935, which ran as follows :

"**102.** (1) Notwithstanding anything in the preceding sections of this chapter, Federal Legislature shall, if the Governor-General has in his discretion declared by Proclamation (in this Act referred to as a 'Proclamation of Emergency') that a grave emergency exists whereby the security of India is threatened, whether by war or internal disturbance, have power to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List :

Provided that no Bill or amendment for the purposes aforesaid shall be introduced or moved without the previous sanction of the Governor-General in his discretion, and the Governor-General shall not give his sanction unless it appears to him that the provision proposed to be made is a proper provision in view of the nature of the emergency.

(2) Nothing in this section shall restrict the power of a Provincial Legislature to make any law which under this Act it has power to make, but if any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature has under this section power to make, the Federal law, whether passed before or after the Provincial law, shall prevail, and the Provincial law shall to the extent of the repugnancy, but so long only as the Federal law continues to have effect, be void.

(3) A Proclamation of Emergency—

(a) may be revoked by a subsequent Proclamation;

(b) shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament; and

(c) shall cease to operate at the expiration of six months, unless before the expiration of that period it has been approved by Resolutions of both Houses of Parliament.

(4) A law made by the Federal Legislature which that Legislature would not but for the issue of a Proclamation of Emergency have been competent to make shall cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period."

It will be seen that the section in the Government of India Act included also the matter which is now contained in ART. 352 relating to the question when the President may issue a Proclamation of Emergency.

(b) Other Constitutions.

(b) Other Constitutions.

Provisions for the expansion of the powers of the Centre in times of emergency are a peculiarity of the Indian Constitution borrowed from the Government of India Act, 1935. Neither the American nor the Canadian nor the Australian Constitution contains similar provisions, but Courts have always got over the difficulty by interpreting the war and the defence powers of the Central Government in Central Legislature so as to embrace emergency measures taken by them; but it must be remembered that the determining voice is that of the Courts. It must also be noted that it is not a question of the emergency creating a power which did not previously exist; the emergency only justifies the exercise of a power which already exists.[1] In the

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Article 250 — Note 1

[1] (1934) 78 Law Ed 413 (423) : 290 US 398 (426), *Home Building and Loan Association* v. *Blaisdell.*

(1935) 79 Law Ed 1570 (1579) : 295 US 495 (528), *Schechter* v. *United States.* (Extraordinary conditions do not create or enlarge constitutional power, and cannot justify governmental action outside the sphere of constitutional authority.)

(1917) 31 Law Ed 755 (774) : 243 US 332 (348), *Wilson* v. *New.*

words of Chief Justice Hughes[2] of the Supreme Court of America, "while emergency does not create power or increase granted power or remove or diminish the restrictions imposed upon power granted or reserved, emergency may furnish the occasion for the exercise of power." Thus, power to legislate on a matter reserved for the States cannot be assumed by the Centre even in time of emergency, in the theory of the Constitution. It is only by holding that a certain power is not a State power that the Centre is allowed to exercise that power. See also Notes on Art. 249. Under the Australian Constitution also, a similar principle obtains and it is only by interpreting the defence and war power of the Centre so as to include certain matters that measures taken by the Centre in times of emergency have been upheld.[3]

2. Scope of the article. — This article empowers the Central Legislature to legislate on matters in the State List, during the currency of a proclamation of emergency by the President. Normally matters in the State List are within the exclusive jurisdiction of the State Legislature and the Parliament has no power to deal with them. But the Constitution recognises and provides for certain occasions on which the Parliament has power to make laws as to matters in the State List. One of these contingencies is the issue of a proclamation of emergency by the President under ART. 352. Under that article if the President is satisfied that a grave emergency exists whereby the security of India or any part thereof is threatened whether by war or external aggression or internal disturbance he may by proclamation make a declaration to that effect. When such a proclamation has been made and is in force this article enables the Central Legislature to make laws on all matters including those which are in the exclusive State sphere; but it must be noted that the legislative power of the State Legislature on such matters or those in the Concurrent List is not suspended during the continuance of the proclamation of emergency under ART. 352. (See ART. 251.) The present article confers on the Parliament only a concurrent power of legislation with regard to the matters in the State List.

This power of the Parliament must not be confused with the power which the Parliament gets to legislate on matters in the State List when the President issues a proclamation under ART. 356 superseding the State Government on the ground of the break-down of the

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[2] (1934) 78 Law Ed 413 (423) : 290 US 398 (426), *Home Building and Loan Association* v. *Blaisdell.*

[3] (1916) 21 CLR 433 (Aus.), *Farey* v. *Burvett.* (Legislative Powers of the Commonwealth Parliament conferred by Constitution S. 51(VI) and (XXXIX) include a power during a state of war to fix within limits of locality the highest price which during the continuance of the war may be charged for bread.)

constitutional machinery in a State. When the President issues such a proclamation under Art. 356 he can declare that the powers of the Legislature of the State shall be exercisable by or under the authority of the Parliament. When such a declaration is made the power of the Parliament is not a concurrent one but is one which is exercised *in supersession* of that of the State Legislature.

Under Art. 353, when a proclamation of emergency has been issued under Art. 352 the Parliament may by law confer power and impose duties on Union authorities even in respect of matters which are not in the Union List.

The proclamation of emergency under Art. 352 may be based either on war or external aggression or internal disturbance but where such a proclamation has been issued the Parliament gets the power under this article of making laws on all the matters in the State List. It is not necessary that where a Proclamation of Emergency has been made on the ground of war the legislation which Parliament enacts under this article must only relate to matters connected with the war and not those connected with internal security.[1]

The Parliament legislating under this article on a matter in the State List does not thereby become a State Legislature and is therefore not subject to any restriction to which a State Legislature as such may be subject.[2]

3. "For the whole or any part of the territory of the Union." — Under the corresponding S. 102 of the Government of India Act, 1935, the Central Legislature was given power to make laws "for a province or any part thereof." This gave rise to the contention[1] (though the contention was rejected) that the Parliament under that section could only legislate for each province separately and not for all the provinces together. The present article makes it quite clear that such a contention will not be tenable under it.

4. Ordinance by President. — The President's Ordinance-making power under Art. 123 is co-extensive with legislative power of the Parliament and hence where a Proclamation of Emergency

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Article 250 — Note 2

[1] 1944 FC 1 (10) [AIR V 31] : 45 Cri L Jour 413 (FC), *Piare Dusadh* v. *Emperor.*

[2] 1944 Bom 247 (248) [AIR V 31] : 46 Cri L Jour 354 (DB), *Purshottam Devji v. Emperor.* (Government of India Act (1935), Ss. 102 and 297 — Central Government legislating on Provincial matters under S. 102 — Restrictions under S. 297 do not apply.)

Article 250 — Note 3

[1] 1944 FC 1 (10) [AIR V 31] : 45 Cri L Jour 413 (FC), *Piare Dusadh* v. *Emperor.*

1943 Cal 377 (382, 383) [AIR V 30] (SB), *Shib Nath* v. *Porter.*

has been made the President may issue an Ordinance under ART. 123 with respect to a matter in the State List.[1] See ART. 123, NOTE 9.

5. Clause (2).—Just as under ART. 249, a law made by Parliament with respect to the matter in the State List in consequence of resolution passed by the Council of States under that article can only be of temporary duration under cl. (3) of that article, so also, a law made by Parliament under this article with respect to a matter in the State List can only be of temporary duration and will cease to be effective on the expiry of six months from the date on which the Proclamation of Emergency ceases to operate;[1] but the law made by Parliament will cease to have effect only to the extent of the matters in the State List and not as a whole unless the portions dealing with the matters in the State List and other portions are inseparable in which case the whole law will cease to be effective at the end of the six months' period above mentioned. Under the corresponding S. 102 of the Government of India Act, 1935, the words "to the extent of the incompetency" which occur in cl. (2) of this article were not present and so it was held that the whole of the Act passed by the Central Legislature ceased to have effect.[2]

Though an Act made by Parliament may cease to have effect by virtue of cl. (2) of this article this will not affect anything done or omitted to be done under the Act. Under this principle if an offence has been committed under the Act and a prosecution has been started, the expiry of the Act will not affect the proceedings.[3]

Article 250 — Note 4

[1] *See* 1943 Cal 377 (389) [AIR V 30] (SB), *Shib Nath* v. *Porter*. (Case under corresponding provision regarding Ordinance under Govt. of India Act, 1935.)

1943 Nag 36 (44, 45) [AIR V 30] : 44 Cri L Jour 237 (DB), *Sitao Jholia* v. *Emperor*. (Do.)

1951 All 703 (706) (Pr 12) [AIR V 38 C 184] : ILR (1953) 1 All 458 : 52 Cri LJ 1094, *Jugmendar Das* v. *State*. (Do.)

Article 250 — Note 5

[1] *See* 1942 Cal 464 (465) [AIR V 29] : 43 Cri L Jour 793 (DB), *Bimal Protiva Debi* v. *Emperor*.

[2] 1943 Cal 377 (382, 383) [AIR V 30] (SB), *Shib Nath* v. *Porter*.

[3] 1951 All 703 (708, 709) (Prs 17, 20) [AIR V 38 C 184] : 52 Cri L Jour 1094 : ILR (1953) 1 All 458, *Jugmendar Das* v. *State*.

1950 Cal 214 (216) (Pr 9) [AIR V 37 C 76] : ILR (1950) 1 Cal 491 (DB), *Dawoo Doyal* v. *Giridhari Laha*.

1949 Nag 134 (135) (Pr 7) [AIR V 36 C 53] : ILR (1948) Nag 540 : 50 Cri L Jour 332, *Dhawanji Rawji* v. *Emperor*.

('47) 49 Bom LR 352 (382) (DB), *Emperor* v. *J. K. Gas Plant and Co. Ltd.*

Inconsistency between laws made by Parliament under Articles 249 and 250 and laws made by the Legislatures of States.

251. Nothing in Articles 249 and 250 shall restrict the power of the Legislature of a State to make any law which under this Constitution it has power to make, but if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament has under either of the said articles power to make, the law made by Parliament, whether passed before or after the law made by the Legislature of the State, shall prevail, and the law made by the Legislature of the State shall to the extent of the repugnancy, but so long only as the law made by Parliament continues to have effect, be inoperative.

GOVERNMENT OF INDIA ACT, 1935

"**102.** *(2)* Nothing in this section shall restrict the power of a Provincial Legislature to make any law which under this Act it has power to make, but if any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature has under this section power to make, the Federal law, whether passed before or after the Provincial law, shall prevail, and the Provincial law shall to the extent of the repugnancy, but so long only as the Federal law continues to have effect, be void."

[NOTE—See also S. 107 reproduced under ART. 254.]

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in ART. 251, for the words and figures, "Articles 249 and 250", the word and figures "Article 250" shall be substituted, and the words "under this Constitution" shall be omitted; and for the words "under either of the said articles", the words "under the said article" shall be substituted — The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

1. **Repugnancy.** — As to the meaning of 'repugnancy', see ART. 254, NOTE 15.

2. **Effect of repugnancy.**—See ART. 254, NOTE 17.

POWER OF PARLIAMENT

Power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State.

252. (1) If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in Articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the Houses of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State.

(2) Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State.

GOVERNMENT OF INDIA ACT, 1935

"**103.** If it appears to the Legislature of two or more Provinces to be desirable that any of the matters enumerated in the Provincial Legislative List should be regulated in those Provinces by Act of the Federal Legislature, and if resolutions to that effect are passed by all the Chambers of those Provincial Legislatures, it shall be lawful for the Federal Legislature to pass an Act for regulating that matter accordingly, but any Act so passed may, as respects any Province to which it applies, be amended or repealed by an Act of the Legislature of that Province."

JAMMU AND KASHMIR

Article 252 applies to the State of Jammu and Kashmir—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Cl. (1) — "Where there are two Houses" — There are two Houses in the following States, namely, Bihar, Bombay, Madras, Mysore, Punjab, the Uttar Pradesh and West Bengal—See Art. 168 (1) (a).

1. Scope of the article. — This article corresponds to S. 103 of the Government of India Act, 1935. Where the conditions mentioned in the article are satisfied it is not necessary that the law passed by the Parliament must expressly state that it is passed under the power conferred by the article.[1]

Legislation for giving effect to international agreements.

253. Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

GOVERNMENT OF INDIA ACT, 1935

"**106.** *(1)* The Federal Legislature shall not by reason only of the entry in the Federal Legislative List relating to the implementing of treaties and agreements with other countries have power to make any law for any Province except with the previous consent of the Governor, or for a Federated State except with the previous consent of the Ruler thereof.

(2) So much of any law as is valid only by virtue of any such entry as aforesaid may be repealed by the Federal Legislature and may, on the treaty or agreement in question ceasing to have effect, be repealed as respects any Province or State by a law of that Province or State.

(3) Nothing in this section applies in relation to any law which the Federal Legislature has power to make for a Province or, as the case may be, a Federated State, by virtue of any other entry in the Federal or the Concurrent Legislative List as well as by virtue of the said entry."

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, to ART. 253, the following proviso shall be added, namely :

> "Provided that after the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, no decision affecting the disposition of the State of Jammu and Kashmir shall be made by the Government of India without the consent of the Government of that State."—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

"For implementing any treaty"—As an instance see the Assam (Alteration of Boundaries) Act, 1951 (47 of 1951) which is enacted in order to comply with Art. 4 of the Indo-Bhutan Treaty of Friendship concluded on 8-8-1949.

Article 252 — Note 1

[1] 1949 Mad 481 (490) (Pr 17) [AIR V 33 C 220] : ILR (1949) Mad 739 : 50 Cri L Jour 684 (FB), *In re S. M. Nathaniel.* (Case under Govt. of India Act, 1935, S. 103.)

"For implementing any agreement"—As an instance see the Code of Civil Procedure (Second Amendment) Act, 1951 (19 of 1951) whereby O. 5, R. 25 of the Civil P. C., is amended with a view to implementing the agreement entered into with the Pakistan Government on reciprocal basis.

"For implementing any convention" — As an instance see the Marking of Heavy Packages Act, 1951 (39 of 1951) which is enacted to give effect to the Convention adopted by the International Labour Conference in 1929.

1. Scope of the article.—Under SCH. VII, LIST 1, Entry 14, "Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries," are a Union subject. This article makes it clear that the Parliament can make laws for the purpose of implementing treaties and agreements with foreign countries even where such treaties and agreements concern matters in the *State* List.

Under the American Constitution, a treaty between America and a foreign country becomes itself the law of the land without any necessity of an Act of the Congress implementing such treaty. The position is different in India. (See ART. 51, NOTE 2.) See also the undermentioned case regarding Canada.[1]

Article 51, which is one of the "directive principles of the State policy", requires the State, *inter alia*, "to foster respect for ihternational law and treaty obligations in the dealings of organised peoples with one another." This article and SCH. VII, LIST 1, Entry 14 provide the machinery for securing the above object.

See also ART. 51 and commentary thereon.

Article 253 — Note 1

[1] (1937) 106 LJ PC 72 (78) : 1937 App Cas 326, *Att. Gen. for Canada* v. *Att. Gen. for Ontario.* (The Parliament of the Dominion of Canada passed the Weekly Rest in Industrial Undertakings Act, 1935, and the Minimum Wages Act, 1935, and the Limitation of Hours of Work Act, 1935, in accordance with the conventions adopted by the International Labour Organization of the League of Nations in accordance with the Labour Part of the Treaty of Versailles of June 28, 1919. The Dominion Parliament claimed the power to pass those Acts under S. 132 of British North America Act, 1867, as being legislation "necessary or proper for performing the obligations of Canada or any Province thereof as part of the British Empire, towards foreign countries arising between the Empire and such foreign countries". Held that S. 132, British North America Act, did not apply since the obligations under the conventions were not obligations of Canada as part of the British Empire, but of Canada by virtue of her new status as an international person, and did not arise under a treaty between the British Empire and foreign countries : *Attorney Gen. for Quebec* v. *Att. Gen. for Canada*, 1932 App Cas 304, *Rel. on.* The legislation in question was within the classes of subjects assigned to the *Provinces* under S. 92, British North America Act and therefore was *ultra vires.*)

Inconsistency between laws made by Parliament and laws made by the Legislatures of States.

254. (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State specified in Part A or Part B of the First Schedule with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State :

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

GOVERNMENT OF INDIA ACT, 1935

For text of S. 107 of the Government of India Act, 1935, which corresponded to this article, see Note 1.

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in Art. 254, the words, brackets and figure "or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2)" and the words "or as the case may be, the existing law", occurring in clause (1), and the whole of clause (2) shall be omitted. — The Constitution (Application to Jammu and Kashmir) Order,1954 (14-5-1954).

COGNATE PROVISIONS.

Clause (1) Concurrent List—Meaning of, see Art. 246 (2).

Clause (1)—Existing law—Interpretation of, see Art. 366 (10).

Clause (2)—"Reserved for the consideration of the President"—See Art. 200.

Clause (2)—Ordinance promulgated by the Governor of a Part A State under Art. 213 in pursuance of instructions from the President to be deemed to be an Act of the Legislature of the State—See Art. 213 (3) Proviso.

Synopsis

1. Analogous law
   - (a) Government of India Act, 1935.
   - (b) Australian Constitution.
   - (c) American Constitution.
   - (d) Canada.
   - (e) Colonial Laws Validity Act, 1865 (28 and 29 Vict. Ch. 63).
2. Scope and applicability.
   - (a) General summary of article and its effect.
   - (b) Repugnancy and competency—Distinction.
   - (c) Applicable only to statute law.
   - (d) Article not applicable to inconsistency between Central law and existing law.
   - (e) Article not confined to laws falling in the Concurrent List.
   - (f) General principle : Implied repeal of earlier inconsistent law.
   - (g) Applicability: Some aspects.

2a. Relative scope of this article and Art. 246. See Notes 2, 5 and 12.

2b. Repugnancy and competency of legislation — Distinction. See under Notes 2 and 12.

2c. Whether this article applies only to laws falling in Concurrent List. See Note 12.

2d. State law with respect to matter in the State List whether impeachable for repugnancy. See under Note 12.

3. Part C States.

4. Applicability of article to Jammu and Kashmir.

5. Repugnancy of State law to law made by Parliament.
   - (a) Applicability of article not confined to cases in which the Central law is with respect to matter in Concurrent List.
   - (b) Opposite view criticised.
   - (c) Jammu and Kashmir.
   - (d) Civil Procedure Code.
   - (e) Pre-Constitution Provincial law.

6. Repugnancy of State law to existing law.

7. "Law made by Parliament."

8. "Whether passed before or after the law made by the Legislature of such State."

9. Law made by Legislature of a State.

10. Ordinance by State Governor.

11. Existing law.

12. "With respect to one of the matters enumerated in the Concurrent List."
    - (a) Introductory.
    - (b) Existing law must relate to Concurrent subject.
    - (c) Must Union law also relate to Concurrent subject ?
    - (d) Clauses (1) and (2) compared.
    - (e) Must State law be with respect to Concurrent subject ?
    - (f) Position under cl. (2).
    - (g) Position under cl. (1).
    - (h) As regards repugnancy to Union law.
    - (i) As regards repugnancy to "existing law"—State law must be with respect to matter in Concurrent List.
    - (j) State law covered in pith and substance by State List is not bad for repugnancy to existing law.

(k) Criticism of above view.
(l) View not justified by language of article.
(m) Inconsistency with doctrine of "occupied field."
(n) Repugnancy does not mean that the conflicting laws must fall in same Legislative List.
(o) Above proposition not contrary to decisions.
(p) Competency of legislation does not conclude question of repugnancy.
(q) Privy Council authorities examined.
(r) *Meghraj* v. *Allah Rakhia* was based on concession of point by counsel.
(s) *Profulla Kumar Mukherjee* v. *Bank of Commerce* not relevant to point.
(t) Argument that as cl. (1) is 'subject to' cl. (2), it only covers the same kind of cases.
(u) Failure to notice relevant authorities.
(v) Erroneous conception as to relative scope of Arts. 246 and 254.
(w) Scope of Art. 246 distinct from that of this article.
(x) Repugnancy due to same matter occurring in more than one Legislative List.
(y) Repugnancy between laws with respect to matters in different Legislative Lists.
(z) Such repugnancy not curable by applying *non obstante* clause in Art. 246 or doctrine of pith and substance.
(z1) Meaning of dictum that question of pith and substance does not arise under this article.
(z2) How far is the dictum good law.
(z3) Repugnancy of Provincial law to Federal law in matter outside Concurrent field.
(z4) Repugnancy between Provincial law falling under Provincial List and existing law falling under Concurrent List—Settled law unsatisfactory—Need for Supreme Court decision.
(z5) Repugnancy between State and Union laws in matters outside Concurrent List—Article is applicable—Criticism of contrary decisions.
(z6) Repugnancy between State law and existing law with respect to matters outside Concurrent List.
(z7) Requirement as to matter falling in Concurrent List whether applies to existing law as a whole or to the particular provision to which the repugnancy relates.
(z8) Existing law relating to procedure.
(z9) Recapitulation and summing up.

13. Principle of pith and substance—Relevancy under article — See Notes 5, 12 (z1) and 15 and Art. 246 Note 9.

14. Doctrine of occupied field. — See Notes 5, 6 and 12 and Article 246 Note 10.

15. Repugnancy, meaning of.
(a) Inconsistency — Impossibility of simultaneous operation of both laws.
(b) Involvement of contradictory propositions.
(c) Test same as in repeal by implication.
(d) Unless the two laws deal with same subject there can be no repugnancy.
(e) Direct conflict means repugnancy.
(f) Absence of direct conflict does not necessarily mean absence of repugnancy.
(g) Test of obedience to both laws not conclusive.

- (h) Divergent provisions relating to same matter are repugnant to each other.
- (i) Test of paramount law evincing intention to cover whole field.
- (j) Laws containing same provisions relating to same subject may be repugnant to each other.
- (k) Authorities regarding above examined.
- (l) Position explained.
- (m) Anomalous results that would follow if position were otherwise.
- (n) Concept of both laws existing side by side : Fact that result would be same whether one or other applied is not enough.
- (o) "One matter, one law."
- (p) Supreme Court decision as to above.
- (q) Objections as to test of 'occupied field' — Interference with powers of State Legislature.
- (r) Inconsistency in actual provisions not necessary : Observations of Federal Court in *Lakhi Narayan* v. *Province of Bihar* explained.
- (s) Some dissenting views examined.
- (t) *Mangtu Lal* v. *Radha Shyam.*
- (u) *State* v. *Zaverbhai.*
- (v) No question of interference with power of Provincial Legislature.
- (w) Decisions on Australian Constitution not irrelevant.
- (x) Other reasons against dissenting view.
- (y) Test as to both laws standing together not derogatory to theory of occupied field.
- (z) What is meant by both laws standing together.
- (z1) Conclusion : 'Occupied field' a sound test.
- (z2) Where the matter is not same, no repugnancy.
- (z3) Paramount law not exhaustive : No repugnancy.
- (z4) Paramount law itself providing for exceptions — Laws coming within exceptions not repugnant.
- (z5) Summing up.
- (z6) Illustrative cases.
- (z7) Identity of subject and pith and substance rule.
- (z8) Repugnancy distinguished from incompetency of legislation — See Notes 2 and 12.

16. Proof of repugnancy.
17. Effect of repugnancy.
    - (a) Introductory.
    - (b) 'Void', meaning of.
    - (c) Repugnant law not *ultra vires.*
    - (d) Effect of repeal of the paramount law.
    - (e) Central Legislature, power of, to repeal Act of State Legislature.
    - (f) Repugnancy purely matter for determination by Court, not Legislature.
    - (g) Exception to rule that one Legislature cannot repeal Act of another Legislature.
    - (h) Retrospective effect.
    - (i) Duty of Court when repugnancy is alleged.
    - (j) No repugnancy between State law and Central law on a subject — Effect — Both apply.
18. "Shall, to the extent of the repugnancy, be void" — See Note 17.
19. Power of Central Legislature to repeal law passed by State Legislature on Concurrent subject — See under Note 17.
20. Repeal by implication.
21. President's assent—Cl. (2).
22. Proviso to cl. (2).

1. Analogous law.

(a) Government of India Act, 1935.

(a) Government of India Act, 1935.

The corresponding provision in the Government of India Act, 1935, was contained in SEC. 107 of that Act[1] which ran as follows :

> "**107.** (1) If any provision of a Provincial law is repugnant to any provision of a Federal Law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void.
>
> *Inconsistency between Federal laws and Provincial, or State Laws.*
>
> (2) Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal law or an existing Indian law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of his Majesty, the Provincial law shall in that Province prevail, but nevertheless the Federal Legislature may at any time enact further legislation with respect to the same matter :
>
> Provided that no Bill or amendment for making any provision repugnant to any Provincial law, which, having been so reserved, has received the assent of the Governor-General or of His Majesty, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.
>
> (3) If any provision of a law of a Federated State is repugnant to a Federal law which extends to that State, the Federal

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Article 254 — Note 1

[1] See 1950 Bom 101 (106, 107) (Prs 10, 12) [AIR V 37 C 28] : ILR (1949) Bom 537 : 51 Cri L Jour 558 (DB), *Antonius Raab, In re.* (His Highness the Maharaja of Baroda had power in the exercise of his executive authority to confer upon an erstwhile alien the rights of a Baroda State subject prior to the passing of the Indian Independence Act and this power was not excluded because of the provisions of S. 18(3), Indian Independence Act and Ss. 8 and 107(3), Govt. of India Act and the Naturalization Act, 1926 taking into consideration the Standstill Agreement and the Instrument of Accession arrived at between the Baroda State and the Indian Dominion.)

law, whether passed before or after the law of the State, shall prevail and the law of the State shall, to the extent of the repugnancy, be void."

(b) Australian Constitution.

(b) Australian Constitution.[2]

Section 109 of the Commonwealth of Australia Constitution Act (63 & 64 Vict., c. 12), runs as follows :

> "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

(c) American Constitution.

(c) American Constitution.

In the American Constitution there is no corresponding provision and there is no concurrent legislative list. But congressional legislation supersedes State law where the same matter is the subject of legislation by both the Congress and the State Legislature.[3]

(d). Canada.

(d) Canada.

In the British North America Act, 1867 (30 & 31 Vict., c. 3), there is no express declaration of supremacy of the Dominion over Provincial laws ; but it has been laid down in a number of cases that where there is a conflict between a Dominion law and a Provincial law, the former is paramount.[4]

(e) Colonial Laws Validity Act, 1865 (28 and 29 Vict., Ch. 63.)

(e) Colonial Laws Validity Act, 1865 (28 and 29 Vict., c. 63).

Section 2 of this Act provided that colonial laws, which were repugnant to any Act of Parliament extending to the colony, shall be void to the extent of such repugnancy.[5]

(a) General summary of article and its effect.

2. Scope and applicability. — This article deals with the question of inconsistency between a law made by the Legislature of a State and a law made by the Parliament. The article also deals

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[2] For a comparative study of the distribution of Legislative powers in various other constitutions, see the judgment in *Pannalal* v. *Hyderabad State*, 1952 Hyd 187 (189) (Pr 6) [AIR V 39] : ILR (1952) Hyd 684 : 1952 Cri L Jour 1740 (FB).

[3] 1952 Hyd 187 (189) [AIR V 39] : ILR (1952) Hyd 684 : 1952 Cri L Jour 1740 (FB), *Pannalal Lahoti* v. *Hyderabad State.*

(1898) 42 Law Ed 878 (881) : 169 US 613 (322), *Missouri, K. and T. R. Co.* v. *Haber.*

(1895) 39 Law Ed 910 (912) : 158 US 98 (102), *Gulf Colorado and S. F. R. Co.* v. *Hefley and Lewis.*

(1890) 33 Law Ed 637 (642) : 133 US 333 (348), *Davis* v. *Beason.*

[4] 1942 FC 27 (30) [AIR V 29] (FC), *Megh Raj* v. *Allah Rakhia.* (Wynes' "Legislative and Executive Powers in Australia", pp. 91, 92, referred to.)

[5] *See* 1949 PC 127 (Pr 6) [AIR V 36 C 41] (PC), *Chenard and Co.* v. *Joachim Arissal.* (Section 192 (1) (a), Seychelles Penal Code was not repugnant to any Act of Parliament.)

with inconsistency between a law made by the Legislature of a State and an 'existing law' as defined in ART. 366 cl. (10), that is, (in substance) a law made before the commencement of the Constitution by a competent authority. Thus, the article deals with the inconsistency of a *State* law with two kinds of laws, namely, (i) a law made by *Parliament* after the coming into force of the Constitution, and (ii) a law made prior to the commencement of the Constitution by a competent authority.

The result of the repugnancy in both the cases will be to make the State law void to the extent of the repugnancy (unless the repugnancy is cured under cl. (2)). But the conditions which will invalidate the State law for repugnancy to a law made by the Parliament are not identical with the conditions which will invalidate the State law on the ground of inconsistency with an 'existing law'. In the former case, that is, in the case of inconsistency with a law made by Parliament, the State law will be bad for repugnancy as a general rule in *all* cases, with one exception, namely, where the two laws in question deal with a matter in the Concurrent List and the State law has been made with the assent of the President under cl. (2) of the article. In cases covered by this exception, the State law will prevail over the Parliamentary law, so far as that particular State is concerned.

In regard to the other case contemplated by the article, namely, inconsistency of a State law with an "existing law," the general rule is that the State law is to prevail, with one exception, namely, that where the two laws deal with a matter in the Concurrent List, the "existing law" is to prevail. There is, however, an exception to this exception, namely, that where the State law has been made with the assent of the President under cl. (2), it is to prevail as against even an "existing law" dealing with a matter in the Concurrent List.

So, the position under the article may be summed up as follows: Where the State law has *not* been made with the assent of the President under cl. (2), it will, as a general rule, be overridden by a Parliamentary law which is inconsistent with it, but will, as against an "existing law," prevail in all cases except where the two laws in question deal with a matter in the Concurrent List. Thus, it would seem to be the policy of the article to favour a Parliamentary law as against the State law and a State law as against an existing law. When a conflict between a State law and a Parliamentary law is noticed, therefore, one may start with the presumption that the Parliamentary law is to prevail against the State law. This presumption may be displaced by showing that the two laws in question deal with a matter in the Concurrent List and that the State law has been made with the assent of the President under cl. (2). In such a case, the State law will prevail as against the Parliamentary law so far as the particular State is concerned.

Similarly, when a conflict is noticed between a State law and an "existing law" that is, a law made before the commencement of the Constitution, one may start with the presumption that the State law will prevail. This presumption may, however, be displaced by showing that the two laws in question deal with a matter in the Concurrent List. In such a case, it is the existing law that will ordinarily have the overriding effect. But such overriding effect of the existing law in regard to a matter in the Concurrent List can be avoided by obtaining the assent of the President under cl. (2) to the State law, in which case the State law notwithstanding its inconsistency with an existing law on a concurrent subject, will prevail so far as that particular State is concerned.

This article corresponds to S. 107 of the Government of India Act, 1935, and the two provisions are exactly parallel to each other. Under the Government of India Act also, a distinction is made between a repugnancy to a "Federal Law" and that to an existing Indian law. The distinction proceeds on lines similar to those under this article. In other words, a Provincial law conflicting with a Federal law will generally have to give way before the Federal law, except when the two laws deal with a concurrent subject, *and* the Provincial law has been made with the assent of the Governor-General or His Majesty. So also, where a Provincial law conflicts with an existing Indian law (which was defined in terms similar to those of the definition of 'existing law' in ART. 366 cl. (10)), the Provincial law will, as a general rule, prevail except when the existing Indian law deals with a concurrent subject, even in which case the existing Indian law will have to give way before the Provincial law if the Provincial law has received the assent of the Governor-General or His Majesty.

The above is a summing up of the effect of the provisions of this article. The article contains two clauses. The first clause states the general rule as to when a State law will be invalidated by its repugnancy to another law. Clause (2) enunciates the exception to the general rule in cl. (1).

As already stated, the article deals with the question of repugnancy of a State law to two kinds of laws, namely, Parliamentary law and existing law. Under the general rule stated in cl. (1), and in the circumstances mentioned therein, the State law in question will become void to the extent of its repugnancy. Clause (2), which enacts an exception to this rule, provides that the State law which has received the assent of the President will prevail, so far as particular State is concerned notwithstanding the repugnancy.

There is a proviso to cl. (2), which expressly saves the power of Parliament to subsequently enact a law which is inconsistent with law which has received the assent of the President under cl. (2).

(b) Repugnancy and competency—Distinction.

The article, as the corresponding S. 107 of the Government of India Act, 1935, deals with *repugnancy* of legislation and not with its incompetency.[1] In other words, the question of repugnancy under this article is *de hors* the question whether the concerned laws are within the legislative competence of the respective Legislatures by which they were enacted. The latter question is the subject-matter of ARTS. 245 and 246. Article 246 is of particular importance in the context of this article, as it deals with the question of the distribution of legislative business between the Central and State Legislatures and this article deals *inter alia* with the repugnancy between two laws with respect to the same subject-matter, one of which has been made by a State Legislature and the other has been made by the Central Legislature. The opinion has been expressed that this article only applies where both the competing laws deal in pith and substance with subjects in the Concurrent List, and that in *other* cases, the question of repugnancy is entirely covered by ART. 246, under which Parliament has the prior power of legislation in all cases in which the matter of legislation falls both within the Central as well as the State fields. For a discussion of this question, see NOTES 5 and 12.

(c) Applicable only to statute law.

The plea of repugnancy under this article or under S. 107 of the Government of India Act, 1935, can only be raised on the strength of statute law or statutory rules.[2] Hence, where a certain enactment is not in force in a particular area but the principles of that enactment have been held applicable to that area, a State law or a Provincial law inconsistent with such enactment cannot be attacked on the ground of repugnancy so far as that area is concerned.[3]

Article 254 — Note 2

[1] 1949 Mad 307 (313) (Pr 17) [AIR V 36 C 146] : ILR (1949) Mad 377 : 50 Cri L Jour 405 (SB), *Narayanaswami Naidu* v. *Inspector of Police.*
1950 Pat 265 (278) [AIR V 37 C 67] : ILR 29 Pat 335 : 51 Cri L Jour 1081 (DB), *Brahmeshwar Prasad* v. *State of Bihar.* (Article does not apply to repugnancy to the Constitution itself.)
[See 1954 Vind Pra 24 (31) (Pr 37) [AIR V 41 C 9], *Mordhwaj Singh v. State of Vindhya Pradesh.* (In this case, it seems, it is submitted, that the two questions have been mixed up. The invalidity that arises from repugnancy has been assumed to be identical with incompetency of the legislation — See the observations about the repugnancy of the V. P. Land Reforms Act, 1953 to S. 9 of the Civil Procedure Code).]

[2] 1942 FC 27 (31) [AIR V 29] (FC), *Megh Raj* v. *Allah Rakhia.*

[3] 1942 FC 27 (31) [AIR V 29] (FC), *Megh Raj* v. *Allah Rakhia.* (T. P. Act is not as such in force in most of Punjab and hence a plea of an

(d) Article not applicable to inconsistency between Central law and existing law.

This article deals with the repugnancy between a law made by the *Legislature of a State* and a law made by Parliament or an "existing law." The expression "law made by the Legislature of a State" obviously refers to a law made by the Legislature of a State under the Constitution of 1950. It does not refer to a law made by the Legislature of a Province under the Government of India Act, 1935. Such a law will be an "existing law."

The inconsistency between a law made by the Legislature of a Province under the Government of India Act, 1935, and a law made by the Parliament under the Constitution of 1950 is not a matter falling within the scope of this article. Nor does such a question fall within the scope of S. 107 of the Government of India Act, 1935. For, that section only deals with the inconsistency between a law made by the Legislature of a Province under the Government of India Act, 1935, and a *Federal law*, i. e., a law made by the Central Legislature under the Government of India Act, 1935. So, the question as to the inconsistency between a law made by a Legislature of a Province under the Government of India Act, 1935 and a law made by the Parliament under the Constitution of 1950 is a matter covered neither by S. 107 of the Government of India Act, 1935, nor by this article.

From this point of view, it is submitted with respect, that the judgment of the Supreme Court in *Zaverbhai* v. *State of Bombay*[4] and the judgments of the Bombay High Court in the same case,[4a] when the matter was in the lower Court, seem to have overlooked this fact about the non-applicability of this article to cases of repugnancy between a law made by the Legislature of a Province under the Government of India Act, 1935, and a law made by Parliament under the Constitution of 1950. In that case, the contest was between the Bombay Essential Supplies (Temporary Powers) and the Essential Commodities and Cattle (Control) (Enhancement of Penalties) Act (36 of 1947), which was an Act of the Bombay Legislature under the Government of India Act, 1935, and the Essential Supplies (Temporary Powers) Amendment Act, 1950 (52 of 1950), which was an Act of Parliament under the Constitution of 1950. In holding that the Bombay Act was *pro tanto* superseded by the Central Act in the above case, the Supreme Court as well as the Bombay High Court proceeded on the assumption that

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Act of Punjab Legislature being repugnant to T. P. Act cannot be raised under S. 107(1), Govt. of India Act, 1935.)

[4] 1954 SC 752 (753, 757) (Prs 7, 8, 9) [AIR V 41 C 174] : 1955 SCR 799 : 1954 Cri L Jour 1822 (SC).

[4a] 1953 Bom 371 (378, 379, 381) (Prs 21, 23, 32, 33) [AIR V 40 C 118] : ILR (1954) Bom 117 : 1953 Cri L Jour 1602, *State* v. *Zaverbhai*.

this article applied, and dealt with the question by applying the provisions of this article, which as explained already, was not applicable to the case. The real principle involved was that of the repeal of an earlier law by a later law by implication by enacting an inconsistent provision dealing with the same matter. The application of this principle in the above case would have led to the same result, namely, the supersession of the Bombay law by the Central law. Hence, it is only the *reasoning* and not the decision of the Supreme Court, that is the subject of the above criticism.

The inconsistency between a law made by the Parliament and a Provincial law made by a Provincial Legislature under the Government of India Act, 1935, raises the question of repugnancy between a *law made by Parliament* and an "existing law". This matter is not dealt with by this article, although it deals with repugnancy between a *law made by the Legislature of a State* and an "existing law". The corresponding S. 107 of the Government of India Act, 1935, also did not deal with the question of repugnancy between a *Federal* law and an "existing Indian law" although it dealt with the question of repugnancy between a *Provincial* law and an "existing Indian law". In such a case, if the Federal law was with respect to a matter in the Federal List or Concurrent List, it would be *intra vires* the Federal Legislature and as regards the question of its repugnancy to an "existing Indian law" the Federal law would prevail on the principle of repeal by implication. This was expressly held in a Full Bench decision of the Orissa High Court in *Rama Chandra* v. *President, District Board, Ganjam.*[5]

This decision exactly covers the question as to *applicability* of the article which has been raised above in connection with the discussion on the decision of the Supreme Court in *Zaverbhai* v. *State of Bombay.*[6] But apparently, the case was not brought to the notice of their Lordships.[7] The undermentioned decision[8] is open to criticism as having proceeded on the footing that this article applies to a repugnancy between a law made by Parliament and an "existing law".

(e) Article not confined to laws falling in the Concurrent List.

The opinion has sometimes been expressed that this article only deals with repugnancies in regard to matters in the *concurrent field* and that repugnancies in regard to matters in the Union and State Lists are dealt with exclusively by ART. 246. This view has been discussed fully in NOTE 12 where it has been shown to be not correct.

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[5] 1951 Orissa 1 (6) (Pr 14) [AIR V 38 C 1] : 52 Cri L Jour 43 (SB).

[6] 1954 SC 752 [AIR V 41 C 174] : 1955 SCR 799 : 1954 Cri L Jour 1822 (SC).

[7] It may be mentioned, that Jagannadhadas J. who was a member of the Supreme Court Bench (AIR 1954 SC 752 (SC)) had also been a member of the Orissa Full Bench (AIR 1951 Orissa 1).

[8] 1952 Hyd 187 (190) (Pr 11) [AIR V 39] : ILR (1952 Hyd 684 : 1952 Cri L Jour 1740 (FB), *Pannalal Lahoti* v. *Hyderabad State.* (Repugnancy between Criminal Procedure Code Amendment Act, 1951, and Hyderabad Criminal Procedure Code.)

(f) General principle: Implied repeal of earlier inconsistent Law.

In any case in which there is clearly repugnancy between two laws (both of which have been passed by competent Legislatures and are otherwise quite valid) but which is not covered by this article or S. 107 of the Government of India Act, 1935, or other similar express provision, the general principle will apply, namely, that the later law will supersede the earlier one. (See NOTE 20.) For instance, suppose there is a law passed by the Central Legislature under the Government of India Act, 1935, with respect to a matter in the Union List. Where the Legislature of a State under the present Constitution makes a law on a subject in the State List which incidentally trenches on the matter covered by the previous Central law, and there is repugnancy between the two laws as regards such matter, the State law will prevail in the particular State in supersession of the Central law. This article will not apply to the case as it only governs repugnancies between a State Law and an existing law with respect to a matter in the Concurrent List. (See NOTE 12.)

(g) Applicability: Some aspects.

The article does not apply to resolve the inconsistency between two "existing laws".[9]

The article has no application to a conflict between an *order* passed by a *Central* authority and another passed by a *State* authority, both of whom have been acting under powers delegated to them under the same law which is a Central law.[10]

2a. Relative scope of this article and Art. 246. — See NOTES 2, 5 and 12.

2b. Repugnancy and competency of legislation: Distinction. — See under NOTES 2 and 12.

2c. Whether this article applies only to laws falling in Concurrent List. — See NOTE 12.

2d. State law with respect to matter in the State List whether impeachable for repugnancy. — See under NOTE 12.

3. Part C States. — Clause (1) of this article refers in terms to a "Law made by the Legislature of a State". The words "Legislature of a State" are wide enough to cover the Legislature of a Part C State as well as that of a Part A or Part B State. Hence, the provision as to repugnancy contained in cl. (1) is also applicable to laws made by the Legislature of a Part C State. But cl. (2) applies only to the laws made by the Legislature of a Part A or Part B State and not to those made by the Legislature of a Part C State.

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[9] *See* 1951 Nag 317 (319) (Pr 9) [AIR V 38 C 95] : ILR (1950) Nag 898, *Thakurdas* v. *Motibhai.* (Same was position under Govt. of India Act, 1935, S. 107 which also did not apply to repugnancy between two "existing Indian laws". Inconsistency between Central Act of 1920 and Provincial Act of 1937 but passed before 1935 Act came into force not covered by S. 107, Govt. of India Act, 1935.)

[10] 1951 Punj 409 (410) (Pr 9) [AIR V 38 C 120] : 52 Cri L Jour 886 (DB), *Piara Kishen* v. *Crown.*

The legislative powers of the Legislature of a Part C State are not derived *directly* from the Constitution but are derived from *Parliamentary legislation* passed under ART. 240. The Government of Part C States Act, 1951 (49 of 1951), S. 22, corresponds to this article and deals with the question of repugnancy as affecting the validity of a law made by the Legislature of a Part C State. The section runs as follows:

> "**22.** *Inconsistency between laws made by Parliament and laws made by the Legislative Assembly of a State.*—If any provision of a law made by the Legislative Assembly of a State is repugnant to any provision of a law made by Parliament then the law made by Parliament, whether passed before or after the law made by the Legislative Assembly of the State, shall prevail and the law made by the Legislative Assembly of the State shall, to the extent of the repugnancy, be void.
>
> *Explanation*—For the purposes of this section, the expression 'law made by Parliament' shall not include any law which provides for the extension to the State of any law in force in any other part of the territory of India."

It will be seen that there are material differences between the above section and this article. These are:

(i) Section 22 of the Government of Part C States Act, 1951, only deals with repugnancy between a law made by the Legislature of a Part C State and a *law made by the Parliament.* The section does not deal with repugnancy between the law made by the Legislature of a Part C State and an "*existing law.*" This article deals with repugnancy of the State law with *both* these kinds of law, namely, Parliamentary law and "existing law."

Although S. 22 of the Government of Part C States Act, 1951, does not deal with repugnancy between a law made by the Legislature of a Part C State and an 'existing law,' the matter of such repugnancy will be governed by cl. (1) of this article, which refers, as already stated, to "a law made by the Legislature of a State," an expression which is wide enough to cover the law made by the Legislature of a Part C State also, so that where such a law is repugnant to an "existing law," the law of the Part C State will be void under cl. (1) of this article to the extent of the repugnancy.[1]

(ii) The next point of difference between S. 22 of the Government of Part C States Act, 1951, and this article is that there is no provision in the former corresponding to cl. (2) of this article under which repugnancy of a law made by the Legislature of a Part A or Part B State in regard to a Concurrent subject can be cured by obtaining the assent of the President to the State law. Hence, the law made by the Legislature of a Part C State, which is inconsistent with a Parliamentary law or an existing law, in regard to a Concurrent subject is void to the extent of the repugnancy, in every case without any exception whatsoever.

As seen already, the question of inconsistency between the law made by the Legislature of a Part C State and a *law made by Parliament* is dealt with by S. 22 of the Government of Part C States Act, 1951,[2] apart from the fact that it is covered by cl. (1) of this article. But under S. 22 of the Government of Part C States Act, 1951, there is no provision for the validation of the laws of a Legislature of a Part C State (which relates to a Concurrent subject and is repugnant to a law made by the Parliament) by obtaining the assent of the President.

Even with regard to a law made by the Legislature of a Part C State, which is repugnant to an "existing law" and which comes within the purview of cl. (1) of this article and *not* under S. 22 of the Government of Part C States Act, 1951, the procedure of validating the repugnant State law (where it deals with a Concurrent subject) by obtaining the assent of the President is not applicable. The reason is that cl. (2) of this article only provides for such validation in the case of laws made by the Legislature of a Part B or Part A State.

4. Applicability of article to Jammu and Kashmir.—This article has been made applicable to Jammu and Kashmir under ART. 370 (1) (d). But the article has been made applicable subject to an important modification, namely, that the provision as to repugnancy of a State law to an "existing law" dealing with a Concurrent subject has

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Article 254 — Note 3

[1] 1954 Vind Pra 24 (28) (Pr 21) [AIR V 41 C 9], *Mordhwaj Singh* v. *State of Vindhya Pradesh.*

[2] 1954 Vind Pra 24 (30) (Pr 37) [AIR V 41 C 9], *Mordhwaj Singh* v. *State of Vindhya Pradesh.* (However, the assumption in this case that S. 9 of the Civil Procedure Code is a law made by Parliament is obviously not correct and S. 9 of the C. P. C. constitutes only 'existing law'. Hence, the question of repugnancy between the law of the Part C State (Vindhya Pradesh) and S. 9 of the Civil Procedure Code fall to be decided purely under cl. 1 of this Article and not under S. 22 of the Government of Part C States Act, 1951 as assumed in this case.)

been made not applicable to Jammu and Kashmir. So, the article has been made applicable to Jammu and Kashmir only so far as it deals with the question of repugnancy of a State law to a law made by Parliament.

It will be seen that in the case of a law made by Parliament, the rupugnancy of a State law to such Parliamentary law will affect the validity of the State law only where the Parliament is "competent to enact" the law with which the State law is alleged to conflict.[1] Hence, it becomes material to consider whether the law made by Parliament with which a law made by the Legislature of Jammu and Kashmir is alleged to be inconsistent, relates to a matter on which the Parliament is "competent to enact" a law for Jammu and Kashmir. In this connection it must be noted that the competency of Parliament to make laws for Jammu and Kashmir even with regard to matter in the Union List and the Concurrent List is limited and is not a matter of course. In order that the Parliament may be competent to enact a law for Jammu and Kashmir in regard to a matter in the Union List or the Concurrent List, one of two conditions is necessary under ART. 370 :

(i) the President must have declared the matter to correspond to one of the matters specified in the Instrument of Accession of the State of Jammu and Kashmir as those on which the *Dominion Legislature* of India could make laws for Jammu and Kashmir; or,

(ii) the President must have specified with the concurrence of the Government of Jammu and Kashmir the matter as being one on which Parliament can legislate for Jammu and Kashmir.

If neither of these conditions is satisfied, the Parliament will not be competent to legislate for Jammu and Kashmir, even though the subject-matter may be covered by the Union List or the Concurrent List.

It has been stated above that this article has been made applicable to Jammu and Kashmir subject to an important modification. This statement has been made on the strength of the Constitution (Application to Jammu and Kashmir) Order, 1954, dated 14-5-1954. This article was not originally made applicable to Jammu and Kashmir under the Constitution (Application to Jammu and Kashmir) Order, 1950, dated 26-1-1950.

The undermentioned decision of the Kashmir High Court[2] passed on 25-3-1953, proceeds on the footing that this article applies to Jammu

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Article 254 — Note 4

[1] 1953 J & K 25 (33) [AIR V 40 C 17] : 11 J & KLR 1 (DB), *Magher Singh* v. *Principal Secretary, J & K Government.*

[2] 1953 J & K 25 (33, 37) [AIR V 40 C 17] : 11 J & K LR 1 (DB), *Magher Singh* v. *Principal Secretary, J & K Government.*

and Kashmir without any modification. In that case, the question was about the inconsistency between a law of Jammu and Kashmir State and an "existing law." It was assumed for the purpose of the argument that there was a clash between the two laws and that it related to a matter in the Concurrent List. That being so, *prima facie* the State law would be *pro tanto* invalidated. But the learned Judges came to a contrary conclusion on the ground that ART. 254 would only apply where the Parliament had the power to make laws in regard to the matter to which the repugnancy related. It has already been stated above that the legislative powers of the Parliament as regards Jammu and Kashmir are limited even with regard to the matter in the Concurrent List and that the Parliament is not competent to enact laws for Jammu and Kashmir with respect to matters in the Concurrent List or even in the Union List, unless the matter had been specified as being within the jurisdiction of the Parliament to legislate for Jammu and Kashmir under ART. 370 (1) (b). The view that the Kashmir High Court took in the above case was that the matter in question therein was not one on which Parliament was competent to enact laws for Jammu and Kashmir under ART. 370, and that, therefore, the question of repugnancy that arose in the case was not governed by the provisions of this article.[3] It is submitted with respect that the view of their Lordships is not correct. Under this article, the question of the competency of the Parliament to enact the law does not arise at all when the alleged repugnancy is between a State law and an "existing law", as was the case in the matter before the Court. The question of the competency of the Parliament to make the law arises only when the repugnancy of the State law is to a law made by the Parliament, and not when the repugnancy is to an "existing law".

Their Lordships also took the view that under cl. (1) of this article the repugnancy of a State law to an "existing law" would be material only when the State Legislature had the power under the Constitution to make laws with reference to matters enumerated in the Concurrent List, and that inasmuch as ART. 246 cl. (2) conferring power to make laws with reference to matters in the Concurrent List had not been extended to the State of Jammu and Kashmir, cl. (1) of this article did not apply to the question of repugnancy that arose in the case. It is submitted that here again, the view of their Lordships does not seem to be correct. Clause (1) of this article only speaks of an existing law "with respect to one of the matters enumerated in the Concurrent List." The phrase refers only to the *fact of enumeration* and has nothing to do with the *power* to legislate with reference to the enumerated matter. Hence, the language of the clause does not justify the view that inasmuch as the State Legislature of Jammu and Kashmir had not been empowered under the Constitution to legislate with regard to the matters in the Concurrent List, the provisions of this article will not apply to the repugnancy between a law made by the State Legislature and an 'existing law' with reference to a matter in the Concurrent List.

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[3] **1953 J & K 25 (33, 37) (Prs 6, 21) [AIR V 40 C 17] : 11 J & K LR 1 (DB), *Magher Singh* v. *Principal Secretary, J & K Government.***

5. Repugnancy of State law to law made by Parliament.— It has already been seen in NOTE 2 that this article deals with the question of the repugnancy of a State law to two kinds of laws, namely, (i) laws made by Parliament, and (ii) "existing law". The only condition that is laid down for the applicability of the article in the case of repugnancy to a law made by Parliament is that the law must be one which the Parliament is competent to enact. The question as to on what matters the Parliament and State Legislatures will be competent to make laws has been dealt with under ART. 246. The commentary on ART. 246 can be consulted for the principles on which the competency of Parliament to legislate on a certain matter is to be determined.

(a) Applicability of article not confined to cases in which the Central law is with respect to matter in Concurrent List.

It will be noted that in the case of inconsistency of a State law with an "existing law", the article requires for its applicability that the conflicting provision of the existing law must be one with respect to a matter in the Concurrent List. This restriction is not applicable to the case of a law made by Parliament. In other words, the repugnancy of a State law to a law made by Parliament will always attract the applicability of this article, although the law made by the Parliament is not one on a *Concurrent* subject.

Repugnancy between two laws, however, necessarily implies that they relate to the *same matter*. Such repugnancy is, therefore, easily conceivable between a law made by Parliament and a law made by the Legislature of a State, when both the laws fall under the Concurrent List. Where this is not the case and the law of Parliament and the law of the State fall under *different legislative lists*, the question may be asked how there can be any inconsistency at all between the two laws. Thus, suppose the law made by the Parliament falls under the Union List and the law made by the State Legislature falls under the State List. Can there be repugnancy between these two laws ?

Repugnance between these two laws is quite possible because of the principle of pith and substance with its concomitant of incidental encroachment. This principle is applicable to legislation passed by the State Legislature as well as that passed by the Parliament. According to this principle, where a law passed by a State Legislature falls in pith and substance within the State List, it will be deemed as being covered by that List, although it may *incidentally encroach* on a matter in the Union List. Similarly, where a law made by Parliament falls in pith and substance in the Union List but incidentally encroaches on a matter in the State List, it will be deemed to be covered by the Union List. Thus, both the Parliament and the State Legislature have the power of incidental encroachment on each other's fields while making laws, which in pith and substance fall within their own respective fields. Thus, apart from the Concurrent List, a field can be created, by the operation of this principle, where both the Parliament and State Legislature can operate, and a conflict may arise between the provisions of the law made by Parliament and those of the law made by the State Legislature in such cases. (See ART. 246 NOTE 10.) Thus, it is seen that for repugnancy to arise between a law made by Parliament and another law made by State Legislature, it is not necessary that the two laws must necessarily deal with matters in the *Concurrent* List. Such repugnancy can arise even where the law made by Parliament is covered by the Union List and the law made by the State Legislature is covered by the State List.

It has been seen in the commentary on ART. 246 that the doctrine of pith and substance with its concomitant of incidental encroachment is subject to the principle of occupied field. The meaning of this principle of occupied field is that a law made by the State Legislature which, while falling in pith and substance within the State List, *incidentally encroaches* on a matter in the Union List, will, so far as the latter matter is concerned, be operative only if and so long as there is no conflicting provision made by Parliament about the same matter. Thus, the effect of the repugnancy between the law made by the State and the law made by Parliament in such cases is to render the law made by the State Legislature void to the extent of the repugnancy.

The question is whether cl. (1) of *this article* which enunciates the general rule under this Constitution as to repugnancy between State and Central laws, applies to the repugnancy of the kind discussed above, that is, repugnancy which arises in cases in which the conflicting laws do *not* fall under the *Concurrent List*. It has already been submitted in the commentary on ART. 246 (see ART. 246 NOTE 10) that the doctrine of occupied field, as mentioned above, has received statutory embodiment in cl. (1) of this article, so that cl. (1) covers the case of repugnancy between a law made by Parliament falling within the Union List and a law made by the State Legislature falling within the State List. This view receives support from the decision of a Full Bench of the Patna High Court in *Sadanand Jha v. Aman Khan*.[1] In that case, the Patna High Court rejected the

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Article 254 — Note 5

[1] 1939 Pat 55 (65) [AIR V 26] (FB).

contention that sub-sec. (1) of S. 107 of the Government of India Act, 1935, (corresponding to cl. (1) of this article) referred to repugnancy in relation to Concurrent List alone, and held that that clause was applicable even to cases of repugnancy between a Provincial law with respect to matters specified in Provincial List and a Federal law with respect to the matters set out in the Federal or Concurrent List. Dhavle J., observed as follows in the course of his judgment :

> "It has been urged for the appellant that the words following 'an existing Indian law' in sub-sec. (1), namely, 'with respect to one of the matters enumerated in the Concurrent Legislative List', should also be read with the expressions 'any provision of a Provincial law' and 'any provision of a Federal law' occurring earlier in this sub-section; and the reason given is that the expression 'subject to the provisions of this section' in the same sub-section, has, so it is argued, the effect of making the repugnancies dealt with in sub-sec. (1) identical with those dealt with in sub-sec. (2). The construction contended for is opposed to the plain grammar of the sub-section, and there is nothing in the scheme of legislation laid down in the Act to indicate that Parliament intended it. As we have already seen, the enumeration of items in the three lists itself makes it far from improbable that conflicts of legislative provisions would arise in other fields no less than in the concurrent field; and there is no reason to suppose that Parliament intended to leave the former to the operation of S. 100 alone with its qualifications of 'notwithstanding' and 'subject to'. Further, if Parliament had intended to provide in sub-sec. (1) of S. 107 for conflicts in the concurrent field alone, it could easily have done so by adopting the language of sub-sec. (2) which is unmistakably confined to action in the concurrent field. Nor can I agree that the expression 'subject to the provisions of this section' in sub-sec. (1) has the effect of confining the conflicts dealt with in this sub-section to conflicts in the concurrent field. That expression no doubt refers to sub-sec. (2) which is confined to legislation in the concurrent field. But is the provision of this exceptional procedure for the concurrent field any reason for supposing that Parliament either was not aware of or decided to ignore possible conflicts between Provincial legislation in the exclusive field and Federal or the existing Indian law in the concurrent field? As we have seen already from S. 100, the powers of the Provincial Legislatures are subject to the powers of the Federal Legislature. Section 107 may be regarded as a supplement to that provision. In sub-sec. (1) it deals with the effect of repugnancies between Provincial and Federal legislation (whenever passed) without any reference to the fields to which the conflicting enactments may relate, and it also

deals with repugnancies between Provincial legislation and the existing Indian law which has not been referred to in S. 100 and is here in the concurrent field only put on the same footing as Federal law irrespetive of whether this relates to its exclusive or the concurrent field."

It will thus be seen that, as already stated at the beginning of this Note, so far as the question of repugnancy between a State law and a law made by Parliament is concerned, the applicability of this article does not depend upon the laws falling in the Concurrent List. This means that the words "with respect to one of the matters enumerated in the Concurrent List" govern only the words "any provision of an existing law" and not the words "any provision of a law made by Parliament".

In so far however, as the passage from Dhalve J.'s judgment quoted above, makes cl. (1) of this article applicable to inconsistency between a Provincial law falling within the Provincial List and an existing Indian Law falling within the Concurrent List, the observations must be regarded as now no longer good law after the decision of the Privy Council in *Meghraj* v. *Alla Rakhia*.[2] (See NOTE 12.)

(b) Opposite view criticised.

In *Atiqa Begam* v. *Abdul Maghni Khan*,[3] Iqbal Ahmad J., expressed his dissent from the Patna Full Bench referred to above and held that even in the case of a Federal law the question of repugnancy between such law and the Provincial law would be governed by sub-sec. (1) of S. 107 of the Government of India Act (corresponding to cl. (1) of this article) only where the conflicting laws both fall within the Concurrent List. He observed as follows :

> "Section 107 affects the relations between the Federal Legislature and the Provincial Legislature where the laws passed by the two Legislatures are among the subjects in the Concurrent Legislative List and are repugnant to each other. It has no application to cases of repugnancy due to overlapping found between the Provincial List on the one hand and the Federal and the Concurrent Lists on the other. If such an overlapping exists in

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[2] 1947 PC 72 (74) [AIR V 34 C 17] : 74 Ind App 12 : 1947 FCR 77 : ILR (1947) Kar PC 151 (PC).

[3] 1940 All 272 (277) [AIR V 27] (FB).

[*See also* 1951 Punj 409 (410) (Pr 10) [AIR V 38 C 120] : 52 Cri L Jour 886 (DB), *Piara Kishen* v. *Crown*. (In this case also the view was expressed that this article would only apply where the Federal law fell within the concurrent field and not in the exclusive Federal field — Submitted that the view is not correct but on the facts of the case it seems that the Provincial law would be *ultra vires* as falling in pith and substance in the Dominion field and not the Provincial field.)]

any particular case, the Provincial legislation will be *ultra vires* because of the *non-obstante* clause in sub-sec. (1) of S. 100, read with the opening words in sub-ss. (2) and (3) of S. 100. In such cases, the Provincial lagislation will fail not because of repugnance to Federal law but in consequence of being repugnant to the Constitution itself."

With great respect, the above passage seems to proceed on a complete ignoring of the well established principle that the *non obstante* clause of S. 100 of the Government of India Act, 1935, corresponding to ART. 246 of this Constitution, is to be invoked only as a last resort and that wherever possible the validity of Provincial legislation must be upheld in spite of the overlapping of the legislative entries by the application of the principle of pith and substance and incidental encroachment. On the application of the true principles of interpretation to the legislative entries (see commentary on ART. 246), it will be found that there is ample scope for overlapping of Central and State laws, both of which so far as the *competency* of the respective Legislatures under ART. 246 (corresponding to S. 100 of the Government of India Act (1935) is concerned, are absolutely *intra vires.* The *non obstante* clause in S. 100 of the Government of India Act, 1935, corresponding to ART. 246 is absolutely insufficient to resolve the conflict in such cases, apart from the fact that to invoke the *non obstante* clause in such cases would amount to a violation of the established canons of interpretation of legislative powers of Federal and State Legislatures with respect to their respective fields of legislation.

Moreover, if the above construction of cl. (1) of this article is not adopted, the question will arise whether the applicability of the doctrine of occupied field, already explained above, has been impliedly negatived by the provisions of cl. (1) of this article, which, on the interpretation of Iqbal Ahmad, J., which has been criticised above, would not apply to repugnancy between a Federal law and a Provincial law in matters not covered by the Concurrent List. To hold that cl. (1) negatives the applicability of the doctrine of occupied, field would be inconsistent with the view which is now well established (see commentry on ART. 246) that the doctrine of pith and substance is applicable to the interpretation of the legislative entries both in the Government of India Act, 1935, and the Constitution of 1950, for the doctrine of occupied field is part and parcel of the doctrine of pith and substance. The principles of incidental encroachment and 'occupied field' are inseparable concomitants of the doctrine of pith and substance and the adoption of the latter necessarily means that the former also are adopted.

So, cl. (1) of this article cannot be held to have negatived the applicability of the doctrine of occupied field in India to State legislation which conflicts with Union legislation in matters not covered by the Concurrent List. Hence, whatever may be the correct view as to the interpretation of cl. (1) and as to question whether the words "with respect to one of the matters enumerated in the Concurrent List," apply also to a law made by Parliament, it is clear that repugnancy between a law made by Parliament and a law made by the Legislature of a State will *pro tanto* invalidate the latter law even in cases where the conflicting provisions do not fall in the Concurrent List.

It is submitted that there is no point in adopting a mode of construction of the clause which leads to a result at variance with general principles and which is not also required by the grammatical meaning of the language used in the clause. Hence, it is submitted that the better view of the construction of cl. (1) of the article is that as regards repugnancy between a Union law and a State law, the applicability of the clause does not require that the two laws must fall under the *Concurrent* List, and that the requirement as to the conflicting laws falling under the Concurrent List is only applicable to the question of repugnancy between a State law and an 'existing law.'

If it is held that neither cl. (1) of this article nor the doctrine of 'occupied field' applies to repugnancies that arise between a State law which in pith and substance falls in the State List but encroaches incidentally on a matter in the Union List, and a Central law which in pith and substance deals with such matter, then the result would be that if the State law happens to be the later law, it will prevail over the Central law, so far as the State is concerned, but that if the Central law is the later law, it will prevail over the State law. Thus the question as to which of the conflicting laws should prevail would depend on which of them is the *later* law. The view that neither the doctrine of occupied field nor cl. (1) of this article would apply to such cases would not mean that there would be no *possibility of repugnancy* in such cases as there would be no *common field* between the two laws. Such common field would be there because of the incidental encroachment of the State law on a Union subject.

(For a full discussion of the question whether the applicability of the article is confined to repugnancies between laws falling in the Concurrent List, see NOTE 12.)

(c) Jammu and Kashmir.

As seen in NOTE 4, the authority of Parliament to make laws for Jammu and Kashmir even in regard to matters in the Union or Concurrent List is limited to matters which are specified by the

President under ART. 370. With regard to other matters the Parliament has no authority to make laws for Jammu and Kashmir, even if the matter may come in the Union or the Concurrent List. A law of Parliament relating to such matters, therefore, will not be one which the Parliament is "competent to enact" within the meaning of cl. (1) of this article. Hence, where a law made by the Legislature of Jammu and Kashmir conflicts with *such* a law made by Parliament, the State law will prevail over the law of the Parliament notwithstanding the repugnancy.[4]

(d) Civil Procedure Code.

In the undermentioned case[5] of the High Court of Travancore-Cochin, the Civil Procedure Code was assumed to be a Central Act for the purpose of this article. This view is obviously wrong, as the Central Act contemplated by this article is an Act passed by Parliament, while the Civil Procedure Code is obviously not such an Act. The Code of Civil Procedure is an 'existing law,' within the definition in ART. 366, cl. (10). Inconsistency with such a law will invalidate the provisions of the State law only where the conflicting provisions fall under the Concurrent List.

(e) Pre-Constitution Provincial Law.

A law made by a Provincial Legislature before the commencement of this Constitution is not a "law made by the Legislature of a State." Hence, repugnancy between such law and a law made by Parliament is not covered by this article. Such repugnancy is one between an 'existing law' and a law made by Parliament and is not within the scope of this article. In this view, as submitted in NOTE 2, the reasoning in the judgment of the Supreme Court in *Zaverbhai* v. *State of Bombay*[6] is open to criticism as not proceeding on a correct basis. (See NOTE 2.)

6. Repugnancy of State law to "existing law." — As seen in NOTE 2, this article deals with the effect of repugnancy of a State law to two kinds of laws, namely, those made by Parliament and those which constitute an "existing law" according to the definition in ART. 366, cl. (10). In regard to repugnancy to "existing law" the applicability of the article depends on such law falling under the *Concurrent List*. This is shown by the expression "with respect to one of the matters enumerated in the Concurrent List," which qualifies the expression "provision of an existing law" in cl. (1). In such cases the repugnancy will make the State law void to the extent of the repugnancy[1] in the absence of the President's assent under cl. (2) of this article. (See for further discussion NOTE 12.)

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[4] 1953 J & K 25 (33, 37) (Prs 6, 21) [AIR V 40 C 17] : 11 J & K LR 1 (DB), *Magher Singh* v. *Principal Secretary, J & K Government.*

[5] 1953 Trav-Co 41 (43) (Pr 4) [AIR V 40 C 15] (DB), *Mathai Esthappan* v. *Mathai Anna.*

[6] 1954 SC 752 (753, 757) (Prs 7, 8, 9) [AIR V 41 C 174] : 1955 SCR 799 : 1954 Cri L Jour 1822 (SC).

The provisions of S. 107 of the Government of India Act, 1935, were similar to those of this article. Under that section, a law made by the Legislature of a Province, which was inconsistent with an "existing Indian law" (the definition of which under S. 311 of the Act was similar to the definition of "existing law" under ART. 366 cl. (10) of this Constitution) with respect to a matter in the Concurrent List was void to the extent of the repugnancy,[2] unless it had received the assent of the Governor-General or His Majesty under S. 107 sub-sect. (2) (corresponding to cl. (2) of this article).

An amending Act may not itself contain a provision which is repugnant to an "existing taw" but may merely continue provisions which are so repugnant. Even in such cases, the provisions of this article will come into play and the amending Act, by which a previous repugnant law (which was temporary) is extended for a further period, would be affected by this article and would require for its validity the assent of the President.[3]

Article 254 — Note 6

[1] 1953 Trav-Co 41 (43) (Pr 4) [AIR V 40 C 15] (DB), *Mathai Esthappan* v. *Mathai Anna*. (Trav-Cochin Civil Courts Act, 1951, S. 20 conflicts with Civil P. C., S. 7 and is void to the extent of repugnancy — C. P. C. is treated as 'Central' Act. This is not correct. It is an 'existing law.')

[2] 1941 Mad 533 (535) [AIR V 28] : 42 Cri L Jour 793 (FB), *Adilakshmi Ammal In re*. (Madras Prohibition Act, 10 of 1937 — Dangerous drugs being in the Concurrent Legislative List of the Government of India Act, and the Madras Abkari Act, 1886, and the rules framed thereunder being an existing Indian law permitting *ganja* to be possessed, the Madras Legislature could not by reason of the provisions of S. 107, Government of India Act, legislate to prohibit entirely the possession of ganja without reserving the measure for the consideration of the Governor-General or for the signification of His Majesty's pleasure. The Madras Prohibition Act was not reserved for the assent of the Governor-General or for the signification of His Majesty's pleasure and so the Madras Legislature had no power to interfere with the Madras Abkari Act so far as the possession of dangerous drugs was concerned.)

[3] 1953 Pat 14 (17, 21, 24) (Prs 6, 7, 18, 19, 28, 29) [AIR V 40 C 6] : ILR 31 Pat 921 (FB), *Mangtulal* v. *Radha Shyam*. (Section 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, is repugnant to the provision of an existing law, viz. T. P. Act, 1882, with respect to one of the matters enumerated in List III i.e. item 6 within the meaning of Art. 254 (1). Section 11 was therefore void to the extent of the repugnancy by reason of the circumstance that the Bihar Buildings (Lease, Rent and Eviction) Control (Amendment) Act, 1951, which extended the duration of the Principal Act beyond 14-3-52 and upto 14-3-1954 was not reserved for the consideration of the President and did not receive his assent under Art. 254(2).)

It has already been stated that the repugnancy contemplated by this article, in the case of an existing law, is repugnancy to an existing law dealing with a matter in the Concurrent List. It is obvious that inconsistency between the law made by a State Legislature and an "existing law" with regard to a matter in the *State List* will not affect the validity of the State law. Such repugnancy is not covered by this article, and the subject being one within the legislative competency of the State Legislature, the validity of the law made by the State Legislature must be held to be unaffected by the repugnancy and the previous law must, to that extent, be treated as modified, superseded or repealed.

Suppose the inconsistency between the law made by a State Legislature and an existing law relates to a matter in the *Union List.* Will such inconsistency affect the validity of such State law? The answer is 'no,' because it is only where an existing law deals with a matter in the Concurrent List that an inconsistent State law is made void by this article in the absence of the President's assent. It must be noted in this connection that an "existing law" dealing with a matter in the Union List must not be regarded as being equivalent to a *law made by Parliament* with regard to such matter. The mere fact that a law deals with a matter in the Union List is not sufficient to make it a law made by Parliament. Therefore, the considerations that would be applicable to inconsistency between a State law and a law made by Parliament with regard to a matter in the Union List, will not apply to the question of inconsistency between a State law and an *existing law* dealing with a matter in the Union List.

This proposition was conceded by Meredith, J., in *Deonandan Prosad* v. *Ram Prasad.*[4] But placing reliance on the observations of Sulaiman, J., in *Subrahmanyan Chettiar* v. *Muttuswami Goundan,*[5] Meredith, J., invoked the doctrine of "occupied field" in such cases and held that the Provincial law would give way before the existing Indian law dealing with a matter in the Federal List.[6] It is submitted with respect that the views both of Meredith, J. and Sulaiman, J., are not correct. The doctrine of occupied field cannot be invoked in such cases as they do not involve any question of a competition between a Central Legislature and a Provincial Legislature. The

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[**Compare**— 1952 Bom 16 (22) (Pr 15) [AIR V 39 C 2] (DB), *State of Bombay v. Heman Santlal.* (When an Act is passed extending the duration of some law, it cannot be said that some new law is created. *United States* v. *Powers,* (1938) 307 US 214 : 83 Law Ed 1245, Foll.)]

[4] 1944 Pat 303 (304) [AIR V 31] (FB).

[5] 1941 FC 47 [AIR V 28] (FC).

[6] 1944 Pat 303 (304) [AIR V 31] (FB), *Deo Nandan Prosad* v. *Ram Prasad.*

doctrine of occupied field is a concomitant of the larger doctrine of pith and substance and incidental encroachment and the doctrine of pith and substance with its concomitants postulates for its applicability a competition between a Federal Legislature and a Provincial Legislature and it would be erroneous to invoke the doctrine where there is no such competition, merely because a Provincial law conflicts with another law which has *not* been passed by the *Federal Legislature* but deals with a matter in the *Federal List.*

This view receives support from the judgment of their Lordships of the Privy Council in *Prafulla Kumar Mukherjee* v. *Bank of Commerce, Khulna.*[7] In that case, the question was as to the validity of the Bengal Money-Lenders Act, 1940, the provisions of which, in so far as they related to promissory notes, were impeached as conflicting with the provisions of the Negotiable Instruments Act, 1881. Their Lordships pointed out that the Negotiable Instruments Act was not a "Federal law," but an "existing Indian law".

In so far as the inconsistency related to provisions falling within the Concurrent List, such inconsistency was cured by the Governor-General's assent to the Bengal Act under cl. (2) of S. 107 of the Government of India Act, 1935 (corresponding to cl. (2) of this article).

Then remained the question of repugnancy of the Bengal Act to the provisions of the Negotiable Instruments Act which dealt with matters in the Federal List (Item 28: cheques, bills of exchange, promissory notes and other like instruments) of the Government of India Act, 1935.

As regards this question their Lordships have treated the matter as *concluded* by the fact that the Bengal Money-Lenders Act was, in pith and substance, a law with respect to a matter in the *Provincial* List, viz., "money-lending and money-lenders" (Item 27) and hence was absolutely within the legislative competence of the Bengal Provincial Legislature although it incidentally encroached on a matter in the Federal List.

By necessary implication, therefore, their Lordships held that where a Provincial Act was within the legislative competence of the Provincial Legislature as falling in pith and substance within the Provincial List, the fact that some of its provisions *incidentally* touched upon a matter in the Federal List and were repugnant to the provisions of an "existing Indian Law" (*not* a Federal Law), which dealt with such matter, did not affect the validity of the provisions of the Provincial Act.

In other words, in so far as the provisions of a Provincial Act conflicted with an "existing Indian Law" in regard to a matter in the

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[7] 1947 PC 30 (62) [AIR V 34 C 14] : 74 Ind App 23 : 1947 FCR 28 : ILR (1947) Kar PC 161 (PC).

Federal List, the only question was that of the *legislative* competency of the Provincial Legislature. This means that in such cases, the only question is whether the Provincial law which impinges on the Federal List is, in pith and substance, covered by the Provincial List. Granted that the legislation is within the competence of the Provincial Legislature on this principle, the inconsistency of any of its provisions with any provisions of an "existing law" dealing with matters in the *Federal List* will be immaterial. To put the matter in other words, it may be stated by way of summing up of the rule—so long as there is no conflict with a law passed by the *Federal or Central Legislature*, a law passed by a *Provincial or State* Legislature which is within its legitimate field will not be invalid merely because it conflicts with the provisions of some prior law dealing with a matter in the Federal field. In such cases, the subsequent State law will, so far as the particular State is concerned, operate as an implied repeal of the provisions of the earlier law with which the State law is inconsistent on the principle that the power to make a law on any subject includes the power to alter or repeal the previous law thereon. (See also NOTE 12.)

Where the conflict with the 'existing law' on a matter in the Union list arises from the fact that the State law deals directly, i. e., in pith and substance (and not merely incidentally) with such matter, the State law will be *ultra vires* the State Legislature as falling outside its allotted field.

It is the settled law now that although cl. (1) of this article only refers expressly to the "existing law" being with respect to a matter in the Concurrent List, the clause will not apply unless the *State law* is also one with respect to a matter in the Concurrent List. As to a full discussion of this theory and its implications, see NOTE 12.

See also the undermentioned decision.[8]

7. "Law made by Parliament."—An "existing law" dealing with a matter in the Union List cannot be treated as a law made by the Parliament for the purpose of this article. Hence, inconsistency of a *State* law to such "existing law" will not fall within the purview of this article. (See NOTE 6.) Nor will such a case fall under S. 107 of the Government of India Act, 1935, as that section is only concerned with the repugnancy of a law made by a Provincial Legislature under *that Act.*

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[8] 1953 J & K 25 (33, 37) (Prs 6, 21) [AIR V 40 C 17] : 11 J & K LR 1 (DB), *Magher Singh* v. *Principal Secretary, J & K Government.* (Wazir C. J. and Shamair J. in this case were not correct in thinking that repugnancy of a State Law to an "existing law" would not affect validity of the State Law unless the existing law was with respect to a matter on which Parliament was "competent to legislate." In this connection it must be remembered that as regards Jammu and Kashmir the power of Parliament to make laws even with respect to matters in Lists I and III does not extend to all such matters but extends only to such matters as are specified by the President under Art. 370 — See Note 4.)

The law made by the Central Legislature under the Government of India Act, 1935, cannot be treated as a law made by the Parliament for the purpose of this article. Repugnancy of a *State* law to such law made by the Central Legislature under the Government of India Act will only amount to repugnancy to an "existing law" for the purpose of this article. Such a case will not fall under S. 107 of the Government of India Act, 1935, as that section only deals with repugnancy of law made by a Provincial Legislature under that Act.

Repugnancy to the "Constitution" is not the same as repugnancy to a law made by Parliament.[1]

An *order* passed by a Union authority is not a Union *law* and repugnancy between such an order and another order by a State authority, both authorities deriving their powers under the same Central law, is not covered by this article.[2]

8. "Whether passed before or after the law made by the Legislature of a State."—Even where at the time when the law is passed by a State there is no law in existence made by the Parliament to which the State law is repugnant but subsequently the Parliament passes a law to which the State law is repugnant, the repugnancy will invalidate the State law under this article. The same principle will apply where at the time when a law is passed by the Legislature of a State, it is repugnant to a law made by the Parliament in regard to a matter in the Concurrent List and the repugnancy is cured by the fact that the State law has received the President's assent under cl. (2). If subsequently the Parliament makes a law which is inconsistent with the State law, the inconsistency would affect the validity of the State law. The subsequent law made by the Parliament may be an independent law or may be merely a re-enactment of the previous law, repugnancy to which was cured by the President's assent. The re-enactment of the previous law may be by way of an amendment of such law. If the law of the Parliament in the amended form conflicts with the State law, the repugnancy will invalidate the State law *pro tanto*, notwithstanding the fact that the repugnancy of the State law to the Parliamentary law in the original form was cured by the President's assent under cl. (2). The principle that the President's assent under

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Article 254 — Note 7

[1] 1950 Pat 265 (278) (Pr 58) [AIR V 37 C 67] : ILR 29 Pat 335 : 51 Cri L Jour 1081 (DB), *Brahmeshwar Prasad v. State of Bihar.*

[2] 1951 Punj 409 (410) (Pr 9) [AIR V 38 C 120] : 52 Cri L Jour 886 (DB) *Piara Kishen v. Crown.*

cl. (2) cannot cure future repugnancies has been expressly enacted in the form of Proviso to cl. (2). (See also NOTE 22.)

Where the repugnancy of a Provincial law to a Federal law was cured by the Governor-General's assent under sub-sec. (2) of S. 107 of the Government of India Act, 1935, and, after the coming into force of the Constitution of 1950, the original Federal law was amended by Parliament and such amendment introduced a fresh repugnancy between the Provincial law and the amended Federal law, the matter would not come either under this article or under S. 107 of the Government of India Act, 1935. The reason is that this article contemplates repugnancy between the law made by the Legislature of a State and a law made by Parliament, and repugnancy between a law made by a Provincial Legislature under the Government of India Act, 1935, and a law made by Parliament is not within the purview of this article. Similarly, S. 107 of the Government of India Act, 1935, will not cover the case because that section will only apply to repugnancy between a Provincial law and a law made by the Central Legislature under the Government of India Act of 1935. In this view, as submitted in NOTE 2, the judgment of the Supreme Court in *Zaverbhai* v. *State of Bombay*,[1] in which this article was applied to the resolution of the inconsistency between a Provincial law of the Bombay Legislature under the Government of India Act, 1935, and the law made by Parliament under the Constitution of 1950, amending a law of the Central Legislature under the Government of India Act of 1935, is, to that extent, open to criticism as not proceeding on a correct basis.

9. Law made by Legislature of a State. — This article, as already noted in NOTE 2, deals with the repugnancy of a *State* law to a law made by Parliament or to an "existing law." Under S. 107 of the Government of India Act, 1935, also, the repugnancy dealt with was that between a Provincial law and a Federal law or an "existing Indian law" as defined in S. 311 of the Act.

The words used in this article to describe a *State* law are a "law made by the Legislature of a State." Obviously, the reference is to a law made by the Legislature of a State constituted under the republican Constitution of 1950. A law made by a Provincial Legislature prior to the coming into force of the Constitution will clearly not be covered by the expression "law made by the Legislature of a State." Such a law would be an "existing law" as defined in Art. 366 cl. (10). Inconsistency between such a law and the law made by Parliament will, therefore, clearly be a subject not covered by this article. While this article deals with the repugnancy between a law made by the *Legislature of a State* and an "existing law," it does not deal with the

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Article 254 — Note 8

[1] 1954 SC 752 (757, 758) (Prs 7, 8, 9) [AIR V 41 C 174] : 1955 SCR 799 : 1954 Cri L Jour 1822 (SC).

repugnancy between a law made by *Parliament* and an existing law. In this view, as submitted in NOTE 2, the judgment of the Supreme Court in *Zaverbhai* v. *State of Bombay*,[1] is open to criticism as not proceeding on a correct basis.

Section 107, the corresponding provision in the Government of India Act, 1935, also did not cover the case of repugnancy between a law made by the Central Legislature under that Act and an "existing Indian Law" as defined in that Act (which definition was similar to the definition of existing law under ART. 366 cl. (10)). The expression "Provincial Law" in S. 107 of the Government of India Act of 1935, which corresponded to the expression "law made by the Legislature of a State" in this article, also was confined, according to the definition of the expression in S. 311 sub-sec. (2) of the Act, to a law made by the Provincial Legislature constituted *under the Government of India Act, 1935*. Hence, a law, made by a Provincial Legislature *before* the coming into force of that Act, would only be an "existing Indian law" for the purposes of S. 107 of the Government of India Act, 1935. The inconsistency between such law and a *Federal* law, that is, a law passed by the Central Legislature under the Government of India Act, 1935, was not within the purview of S. 107 of the Government of India Act. Such inconsistency could not, therefore, be resolved under the provisions of S. 107 of the Act but should be resolved in accordance with the general principles relating to the construction of statutes.[2]

On the same reasoning, an inconsistency between a law passed by a *Provincial Legislature* before the commencement of this Constitution and an "existing law" as defined in ART. 366 cl. (10) would *not* be a repugnancy between "a law passed by the Legislature of a State" and an "existing law" for the purpose of this article. Such repugnancy would be between two "existing laws," a matter which is not provided for by this article. Similarly, under S. 107 of the Government of India Act, 1935, also the repugnancy between a law passed by a Provincial Legislature *before* the coming into force of the Act of 1935 and an "existing Indian law" as defined in that Act fell outside the purview of S. 107. In such cases, the repugnancy would be one

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Article 254 — Note 9

[1] 1954 SC 752 (753, 757) (Prs 7, 8, 9) [AIR V 41 C 174] : 1955 SCR 799 : 1954 Cri L Jour 1822 (SC). (In this case inconsistency between a law passed by the Bombay Provincial Legislature under the Govt. of India Act, 1935, and a law made by the Parliament was resolved by applying this Article.)

[2] 1951 Orissa 1 (5, 6) (Pr 14) [AIR V 38 C 1] : 52 Cri L Jour 43 (SB), *Ramachandra* v. *President, Dist. Board, Ganjam.* (Conflict between Madras Local Boards Act, 1920 and the Motor Vehicles Act, 1939 (Central Act) could not be resolved by applying S. 107, Govt. of India Act, 1935.)

between two "existing Indian laws," which was a matter not covered by S. 107.[3]

The definition of an "existing law" in Art. 366 cl. (10) includes *inter alia orders.*[4] But the expression "law made by a Legislature of a State" or "law made by Parliament" will not include *orders.* Hence, the repugnancy between an order passed by a *State* authority and another *order* passed by a *Union* authority, both of whom are acting under powers delegated under a Union law is not a repugnancy between a law passed by the Legislature of a State and that passed by Parliament. In other words, a repugnancy merely between two orders, one of which is passed by a Central authority and another by a State authority cannot be resolved by having recourse to this article.[5]

The expression "law made by the Legislature of a State" will include the entire statute as well as individual provisions of a statute.[6]

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[3] 1951 Nag 317 (319) [AIR V 38 C 95] : ILR (1950) Nag 898, *Thakurdas* v. *Motibhai.* (C. P. and Berar Religious and Charitable Trusts Act, 1937 was passed before the coming into force of the Government of India Act, 1935, on 1-4-1937 — Repugnancy between above Provincial Act and Central Act, Charitable and Religious Trusts Act 14 of 1920 was not covered by S. 107 of the Govt. of India Act, 1935.)

[4] 1951 Nag 94 (118) (Pr 173) [AIR V 38 C 22] : ILR (1951) Nag 563 (FB), *Laxmibai* v. *State of Madhya Pradesh.* (Per Mudholkar J.: The C. P. & Berar Letting of Houses and Rent Control Order, 1949, whatever its effect be by virtue of the provisions of the C. P. and Berar Regulation of Letting of Accommodation Act, 1946, cannot be classed as a Provincial law for the purposes of S. 107(2), Govt. of India Act. Accordingly, it was not necessary to reserve this order for the consideration of the Governor-General and to obtain his assent thereto, and hence cannot be said to be invalid for want of such assent: AIR 1921 Cal 708, *Disting.*)

1951 Punj 409 (410) (Pr 9) [AIR V 38 C 120] : 52 Cri L Jour 886 (DB), *Piara Kishen* v. *Crown.* (Section 107, Govt. of India Act comes into play if and only if there is an inconsistency between a Dominion law and a Provincial law; the help of the section cannot be invoked when there is no conflict between two competing statutes and when the conflict is confined to two orders issued by two independent authorities, both acting in exercise of the powers delegated to them by another authority.)

[5] 1951 Punj 409 (410, 411) (Prs 9, 10) [AIR V 38 C 120] : 52 Cri L Jour 886 (DB), *Piara Kishen* v. *Crown.* (A conflict between the E. P. Cotton Cloth and Yarn (Regulation of Movement) Order, 1948, issued by the Provincial Government and the Cotton Textiles (Control of Movement) Order, 1948, issued by the Textile Commissioner of the Government of India, cannot be resolved by a reference to S. 107 of the Government of India Act. The order passed by the Textile Commissioner can by no stretch of imagination be deemed to be a Dominion Law, nor can the East Punjab Order of 1948 be deemed to be a Provincial law.)

[6] 1949 Mad 307 (314) (Pr 21) [AIR V 36 C 146] : ILR (1949) Mad 377 : 50 Cri L Jour 405 (SB), *Narayanaswami Naidu* v. *Inspector of Police.*

10. Ordinance by State Governor.—Under ART. 213, power has been conferred on the Governor of a State to promulgate Ordinances during the recess of the Legislature. An Ordinance promulgated by the Governor of a State has under that article the same force and effect as an Act of the Legislature of a State. The provisions as to repugnancy contained in this article are, therefore, applicable also to an Ordinance promulgated by a State Governor. In other words, a State Governor has no power to promulgate an Ordinance which is repugnant to a law made by Parliament or to an "existing law" with respect to a Concurrent subject except that such repugnant Ordinance would be valid if it related to a matter in the Concurrent List and had been promulgated after obtaining the previous instructions of the President. In the case of an Act of a Legislature of a State which deals with a matter in the Concurrent List and is repugnant to an Act of Parliament or to an existing law dealing with such a matter, it would be necessary for the purpose of validating the law passed by the State Legislature, to reserve it for and obtain the President's assent. But this formality of reservation for President's assent is, under ART. 213, cl. (3), Proviso, dispensed with in the case of an Ordinance by a State Governor which is promulgated after obtaining the previous instructions of the President, which previous instructions are made necessary[1] under ART. 213, cl. (1), Proviso (c).

It is not necessary that the instructions received from the President must be published in the Official Gazette, for the validity of an Ordinance.[2]

(See also ART. 213, NOTES 4 and 7.)

11. Existing law. — The article makes repugnancy to an existing law a matter which will invalidate a law made by the

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1942 Cal 587 (591) [AIR V 29] (DB), *Bir Bikram Kishore* v. *Tafazzal Hossain.* (The expressions "Provincial Law" and "existing Indian Law" in S. 107, do not necessarily mean and refer to any entire statute.)

1942 Cal 429 (433) [AIR V 29] (DB), *Satish Chandra* v. *Sudhir Krishna.* (Bengal Council Act 18 of 1940 which enacted new S. 168A of Bengal Tenancy Act (1885) is Provincial Law as defined by S. 311, Government of India Act, 1935.)

Article 254 — Note 10

[1] 1951 Nag 94 (97) (Pr 19) [AIR V 38 C 22] : ILR (1951) Nag 563 (FB), *Laxmibai* v. *State of Madhya Pradesh.*

1949 Nag 16 (17) (Pr 6) [AIR V 36 C 10] : ILR (1948) Nag 785 : 50 Cri L Jour 84 (DB), *Raonakali Roshanali* v. *Emperor.* (C. P. and Berar Criminal Procedure Code (Amendment) Ordinance (II (2) of 1948) — Assent of Governor-General is deemed to have been given by virtue of Ss. 88(1) (b) (iii) and 88 (3), Government of India Act (1935).)

[2] 1951 Nag 94 (93) (Pr 15) [AIR V 38 C 22] : ILR (1951) Nag 563 (FB), *Laxmibai* v. *State of Madhya Pradesh.*

Legislature of a State, where the existing law relates to a matter in the Concurrent List unless the law made by the Legislature of a State has received the assent of the President under cl. (2). The term "existing law" has been defined in ART. 366, cl. (10) as follows :

> "'Existing law' means any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation."

Section 107 of the Government of India Act, 1935, also contained a provision similar to that under this article, and made the repugnancy of a Provincial law to an "existing Indian law" with respect to a subject in the Concurrent List, a matter which would *pro tanto* invalidate the Provincial law.

The definition of an "existing Indian law" in SEC. 311, sub-sec. (2) of the Government of India Act, was also worded similarly to the definition of "existing law" in ART. 366, cl. (10) of this Constitution and ran as follows :

> "'Existing Indian Law' means any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of Part III of this Act by any Legislature, authority or person in any territories for the time being comprised in British India, being a Legislature, authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation."

As both the definitions show, the term "existing law" refers only to *statutory law* passed before the commencement of the Constitution. Hence, where a statute is not in force in a certain area, but the principles of law as enacted in the statute have been held applicable to that area, such principles will not constitute existing law and repugnancy to such principles will not invalidate the law made by a State Legislature, although the concerned provisions may fall within the Concurrent List.[1]

Similarly, the repugnancy of a law made by State Legislature to personal law like Hindu law will not affect the validity of the State law. The mere fact that the applicability of Hindu law to Hindus in the administration of justice by Courts is based on statutory provisions will not make Hindu law itself a law passed by a legislative authority as required by the definition of "existing law" in ART. 366, cl. (10).[2]

Article 254 — Note 11

[1] 1942 FC 27 (31) [AIR V 29] (FC), *Megh Raj* v. *Allah Rakhia*. (T. P. Act not applicable in most areas of Punjab — Punjab Restitution of Mortgaged Lands Act, 1938, cannot be attacked as repugnant to T. P. Act.)

[2] 1949 Bom 71 (72) (Pr 7) [AIR V 36 C 19] : ILR (1948) Bom 631 : 50 Cri L Jour 147 (DB), *Atmaram Narayan* v. *Emperor*.

The law passed by the Provincial Legislature under the Government of India Act, 1935, will clearly be an *existing law* for the purpose of this article and where it relates to a subject in the Concurrent List, the Legislature of a State under this Constitution cannot make any law dealing with the same subject and inconsistent with the previous law, without obtaining the assent of the President under cl. (2).

So, the term "existing law" will include a law made by a "Native State" prior to the Constitution.[3]

So also, a law made by the Central Legislature under the Government of India Act, 1935, will only be an "existing law" for the purpose of this article. Repugnancy to such law will, therefore, affect the validity of a law made by the State Legislature only where the inconsistent laws fall under the Concurrent List, and not otherwise, while inconsistency of a law made by the State Legislature with a law made by the Parliament under this Constitution will invalidate the State law, even if the repugnancy relates to matters outside the Concurrent List. (See NOTES 5 and 12.)

(a) Introductory.

12. **"With respect to one of the matters enumerated in the Concurrent List."** — It has already been seen in NOTE 2 that the article makes a distinction between a law made by Parliament and an "existing law" with regard to the circumstances under which an inconsistent State law will be rendered void by the repugnancy. In the case of repugnancy to a *law made by Parliament*, the only condition imposed is that the law must be one which the Parliament is "competent to enact". But in the case of an existing law, the repugnancy will not affect the validity of the State law unless the existing law is with respect to one of the matters enumerated in the Concurrent List.

(b) Existing law must relate to concurrent subject.

The above view raises the question as to the true effect of the words "with respect to one of the matters enumerated in the Concurrent List", which occur both in cl. (1) and cl. (2) of the article.

[*See also* 1941 Mad 533 (535) [AIR V 28] : 42 Cri L Jour 793 (FB), *Adilakshmi Ammal In re.* (Madras Prohibition Act (10 of 1937) S. 4(1)(a) is completely *ultra vires* the Provincial Legislature in so far as it relates to dangerous drugs by reason of S. 107 of Govt. of India Act, as it is repugnant to Madras Abkari Act as amended and the rules framed thereunder, and as it had not been reserved for assent of Governor-General.)]

[3] 1953 Trav-Co 19 (23) (Pr 5) [(S) AIR V 43 C 5] : ILR (1955) Trav-Co 741 (FB), *P. M. Bramadathan Nambooripad v. Cochin Devaswom Board.* (Argument advanced was that 'existing law' only included Central Legislation and not a State enactment like Act 1 of 1081 (M.E.) or Ordinance No. 9 of 1124 (M. E.) — Argument rejected as clearly untenable in view of Art. 366.)

As regards cl. (1) it is obvious that these words qualify the words immediately preceding them, namely, "any provision of an existing law," so that it is manifest that in the case of repugnancy of a State law to an *existing* law, such repugnancy will not affect the validity of the State law, unless the existing law or provision thereof (to which the State law is repugnant), is with respect to a matter in the Concurrent List.

(c) Must Union law also relate to concurrent subject ?

But the question is whether the words "with respect to one of the matters enumerated in the Concurrent List" govern also the words "any provision of a law made by Parliament which Parliament is competent to enact". As regards this question, the structure of the sentence clearly shows that the words "with respect to one of the matters enumerated in the Concurrent List" apply only to an existing law and not to a law made by Parliament. The word 'to', which is used *twice* in the sentence, that is, *both* before "any provision of a law made by Parliament" and "any provision of an existing law" indicates clearly that "law made by Parliament" and "existing law" are treated *distributively* as separate entities, each with its own qualifications and *not collectively* as having a common qualification. In the case of a law made by Parliament the qualification is that the law must be one which Parliament is competent to enact. In the case of an "existing law", the qualification is that it must be one with respect to one of the matters enumerated in the Concurrent List, so that the qualification as to the law being with respect to a matter in the Concurrent List is applicable only to an "existing law" and not to a law made by Parliament. Hence, a State law which is repugnant to a law made by Parliament will be void to the extent of the repugnancy under cl. (1), although the repugnancy may relate to a matter *not* in the Concurrent List but in the Union list, and although if the repugnancy had been to an existing law, it would *not* have affected the validity of the State law.

The opinion that the grammatical construction of cl. (1) of the article militates against the proposition that even in the case of repugnancy to a *Central* law, such repugnancy will affect the validity of the State law only where the *Central* law is with respect to a matter in the Concurrent List, has also been expressed by Dhavle, J., of the Patna High Court in *Sadanand Jha* v. *Aman Khan*.[1] (See NOTE 5).

If the above construction were not adopted, the result will be that cl. (1) would be speaking of a law "which Parliament is competent to enact with respect to one of the matters enumerated in the Concurrent List." This result would be anomalous as it would imply that Parliament is competent to enact laws only with respect

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Article 254 — Note 12

[1] 1939 Pat 55 (65) [AIR V 26] (FB).

to *some* of the matters enumerated in the Concurrent List, while Parliament is competent to enact laws with respect to *all* matters enumerated in the Concurrent List.

Another factor which supports the above construction is the presence of a comma after the word 'enact' in cl. (1), while there is no comma after the words 'existing law' in that part of the clause. If there had been a comma after the words "existing law" it would have been possible to argue that the words "with respect to one of the matters enumerated in the Concurrent List" governed *both* "law made by Parliament which Parliament is competent to enact" and "any provision of an existing law."

In this connection it may be noted that in the corresponding S. 107 (1) of the Government of India Act, 1935, there is no comma after the words "which the Federal Legislature is competent to enact". The comma was perhaps inserted in this article to obviate any doubt in this respect and to make it clear that the words as to the law being in the Concurrent List do not apply to a Central law. As pointed out by Mukherjea and Das, JJ., in *Aswini Kumar* v. *Arabinda Bose*,[2] when a statute is carefully punctuated and there is doubt about its meaning, weight should be given to the punctuation. Evidently, the Constitution-makers wished to make it clear that views like those of Iqbal Ahmed, J., in *Atiqa Begum* v. *Abdul Maghni*[3] (quoted in NOTE 5) would not be correct under the new Constitution. (See also NOTE 5.)

(d) Clauses (1) and (2) compared.

A comparison of the language used in cl. (1) with that used in cl. (2) will further support the construction of cl. (1) which has been put forward above. It will be noted that in cl. (2) the word "to" after the word "repugnant" is used in a *collective* sense and not in a *distributive* sense as in cl. (1). The word occurs *only once*, that is, before the words "the provisions of an earlier law made by Parliament" and not *again* before the words "an existing law". This shows that "earlier law made by Parliament" and "existing law" constitute one single quantity for the purpose of the qualification conveyed by the words "with respect to that matter" which follow immediately after the words "existing law", and that this qualification is not meant only for "existing law".

The words "with respect to that matter" relate back to the words "with respect to one of the matters enumerated in the Concurrent List," which occur in the previous part of the clause. Hence, for the purpose of the applicability of cl. (2) it is necessary that *both* the law made by Parliament and the existing law, to which the State law is repugnant, must be with respect to a matter in the Concurrent List. In other words, the curative provisions of cl. (2) cannot be resorted to for the purpose of curing the repugnancy of a State law to a previous Union law unless such Union law is with respect to a matter enumerated in the Concurrent List. Thus, *so far as the curative provisions of cl. (2) are concerned*, an earlier law made by Parliament and "an existing law" stand on the same footing. The repugnancy of a State law, whether it is to such earlier law of Parliament or to an existing law, can only be *cured* under cl. (2) if the conflicting provisions fall under the *Concurrent List.*[4] This is in sharp contrast to the situation under cl. (1) which makes a distinction between cases in which the repugnancy of the State law is to a law made by Parliament and those in which such repugnancy is to an existing law, as explained above.

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[2] 1952 SC 369 (383) (Pr 57) [AIR V 39] : 1953 SCR 1 (SC).
[3] 1940 All 272 (277) [AIR V 27] (FB).

Thus, in the case of repugnancy of a State law to a *law made by Parliament* such repugnancy will, under cl. (1), *prima facie* affect the validity of the State law in *all* cases. But such repugnancy can be cured by the application of cl. (2) only in *some* of those cases, namely, those in which both the law made by Parliament and the State law in question are with respect to a matter in the *Concurrent List.*

But in the case of a repugnancy of a State law to an "*existing law*," such repugnancy will invalidate the State law under cl. (1) only where the existing law is with respect to a matter in the Concurrent List. This means that so far as the question of the *existing law* being with respect to a matter in the Concurrent List is concerned, there is no difference between cl. (1) and cl. (2).

Thus, with regard to the qualification as to a law dealing with a matter in the Concurrent List, the following propositions emerge from the above discussion. :

For the purpose of cl. (1), the above qualification does not apply to a law made by Parliament, but applies only to an existing law. But for the purpose of cl. (2), the above qualification applies both to a law made by Parliament and an existing law.

(e) Must State law be with respect to Concurrent subject ?

The question then arises as to the applicability of the above qualification to a *law made by the Legislature of a State.*

(f) Position under cl. (2).

As regards this question, it is manifest on the face of cl. (2) itself that the clause applies only to cases in which the law made by the Legislature of a State is with respect to a matter in the Concurrent List, as the clause expressly refers to "a law made by the Legislature of a State.........with respect to one of the matters enumerated in the Concurrent list." Hence, the curative provisions of cl. (2) will only apply where *both* the State law and the law of Parliament or existing law, as the case may be, are with respect to a matter in the Concurrent List.

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[4] 1951 Punjab 409 (411) [AIR V 38 C 120] : 52 Cri L Jour 886 (DB), *Piara Kishen* v. *Crown.*

(g) Position under cl. (1).

But as regards cl. (1) the expression "law made by the Legislature of a State" in that clause is not expressly restricted by any qualification. Hence, the question arises whether for the purpose of cl. (1), the law made by the Legislature of a State must be with respect to a matter in the Concurrent List in order to attract the applicability of that clause.

(h) As regards repugnancy to Union law.

On this question, it may be stated at once that so far as repugnancy to a *law made by Parliament* is concerned, the applicability of cl. (1) does not depend upon the State law being with respect to a matter in the Concurrent List.[5]

It has already been seen above that the applicability of cl. (1) to a matter of repugnancy between a State law and a law made by Parliament does not depend upon *the law made by Parliament* being with respect to a matter in the Concurrent List. Thus, so far as the question of repugnancy of a State law to a law made by Parliament is concerned, cl. (1) will apply, although either or both of the conflicting provisions are with respect to a matter *outside* the Concurrent List.

(i) As regards repugnancy to "existing law."—State law must be with respect to matter in Concurrent List.

But where the impugned State law is repugnant to an "*existing law*," it is now the settled law[6] since the decision of the Privy

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[5] 1954 Orissa 186 (Prs 6, 7) [AIR V 41 C 55] : ILR (1954) Cut 504, *H. Naik* v. *Kanhu Charan Das.* (Banking Companies (Amendment) Act, 1953, which amends Banking Companies Act, 1949, which falls under List I, Item 43, prevails against Orissa Estates Abolition Act (1 of 1952) which falls in State List, Item 36 and Concurrent List, Item 42.)
[*See* 1954 Punj 241 (Pr 10) [AIR V 41 C 118] (DB), *Sadhu Singh* v. *Financial Commissioner.* (East Punjab Requisitioning of Immovable Property (Temporary Powers) Act, 48 of 1948, S. 2 (as amended by E. P. Act XI of 1951) which is held to fall in Provincial List, Entry 9, Govt. of India Act, 1935, (now List II, Item 36) is not repugnant to Central Act, Administration of Evacuee Property Act, 1950, which is covered by List III, Entry 41. *Note* : It must be noted that although it is held that as a fact there is no repugnancy between the two laws, it is not on the ground that there can be no repugnancy between a State law dealing in pith and substance with a matter in the State List and a Central Law which falls under List III, nor on the ground that cl. (1) of this Article does not apply to such a case.)]

[6] 1950 FC 59 (62) (Pr 10) [AIR V 37 C 5] : 1949 FCR 693 : ILR 29 Pat 185 : 51 Cri L Jour 921 (FC), *Lakhi Narayan Das* v. *Province of Bihar.* (It is settled by the decision in AIR 1947 PC 72 (PC) that when the Province acts solely within its powers under the Provincial List without relying on any power conferred by the Concurrent List no question of repugnancy under S. 107, Govt. of India Act, 1935, would arise.)

Council in *Meghraj* v. *Allah Rakhia,*[7] that the repugnancy would not affect the validity of the State law under cl. (1) unless the State law is with respect to a matter in the Concurrent List.

That case related to the validity of the Punjab Restitution of Mortgaged Lands Act, 4 of 1938, which was impugned, *inter alia*, as being repugnant to various provisions of "existing Indian law," relating to matters in the Concurrent List. The ground of attack was under S. 107 of the Government of India Act of 1935. But the arguments on both sides proceeded on the hypothesis that the provisions of that section would only apply if in enacting the

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1950 Pat 35 (38) (Pr 15) [AIR V 37 C 14] : ILR 28 Pat 782 : 51 Cri L Jour 300 (DB), *Bhutnath* v. *Province of Bihar.*

[*See* 1954 Raj 252 (254, 255) [AIR V 41 C 79] : ILR (1954) 4 Raj 958 (DB), *Milap Chand* v. *Dwarka Das.* (Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950) — Contention was raised that as impugned Act was one under List II, it could not be impugned for repugnance to existing law under List III. *Held* that the Act came under List III).]

[**But see** 1955 Pat 1 (30) (Pr 20) [(S) AIR V 42 C 1] : ILR 33 Pat 690 (SB), *Brij Bhukan* v. *S. D. O. Siwan.* (Bihar Land Encroachment Act (1950) falls in pith and substance in State List but is bad for repugnancy to Limitation Act, which is an "existing law" with respect to a matter in the Concurrent List.)]

Note : Although this view accords with the view which is being urged in this Note as being the correct view, the decision has to be characterised as being wrong as it goes against the law as established by the Privy Council in *Megh Raj* v. *Allah Rakhia,* AIR 1947 PC 72 (PC) — It has to be pointed out that there is no reference in the judgment to this binding authority on this aspect of the case, though the case is referred to in another connection, nor to another binding authority on the same aspect, viz., *Lakhi Narayan v. Province of Bihar* (AIR 1950 FC 59 (FC).

1947 Cal 1 (6, 7, 10) [AIR V 34 C 1] : ILR (1947) 1 Cal 537 (SB), *Mati Lal Shah* v. *Chandra Kanta Sarkar.* (Although it is held in this case that actually there is no repugnancy between the Beng. Agricultural Debtors Act and the Civil P. C., it recognizes the possibility of a repugnancy between a Provincial law with respect to matter in the Provincial List and "existing Indian law" with respect to matter in the Concurrent List — But this view must be treated as not good law in view of the decision of the P. C. in *Megh Raj* v. *Allah Rakhia* (AIR 1947 PC 72 (PC).)]

7. 1947 PC 72 (74, 75) (Prs 12, 20) [AIR V 34 C 17] : 74 Ind App 12: 1947 FCR 77 : ILR 1947 Kar (PC) 151 (PC).

[*See* 1939 Pat 49 (53) [AIR V 26] (DB), *Muhammad Yunus* v. *Champamani Bibi.* (This decision though prior to the PC decision in AIR 1947 PC 72 (PC) falls within the principle approved by that decision)].

[*See also* 1946 Cal 48 (49) [AIR V 33 C 14] (DB), *Udaychand Mahatab Bahadur* v. *Ajit Kumar Roy.* (A case of repugnancy does not arise if no aspect of any Provincial Legislation encroaches upon any field other than that of the Provincial Legislature. Section 168A, Beng. Ten. Act comes wholly within Prov. List and no question of repugnancy to C. P. C., S. 51, can arise, though under S. 168A, landlord holding decree for arrears of rent can only sell the tenure in arrears and not any other property of the judgment-debtor.)]

impugned law the Provincial Legislature had acted in exercise of its powers under the *Concurrent List* and not the Provincial List. Lord Wright, in delivering the judgment of the Board, approved of this assumption as being the correct approach to the question of repugnancy. Said his Lordship :

> "Thus both parties rightly construed Section 107 as having no application in a case where the Province could show that it was acting wholly within its powers under the Provincial List and was not relying on any power conferred on it by the Concurrent List."

(j) State law covered in pith and substance by State List is not bad for repugnancy to 'existing law.'

It has already been seen in the Commentary on ART. 246 that in order to determine whether a piece of legislation is "with respect to a matter" in one or other of the three Legislative Lists, the pith and substance of the legislation must be looked at. Hence, in order to see, for the purpose of this article, whether the law made by the Legislature of a State is with respect to one of the matters enumerated in the Concurrent List, the pith and substance of the law must be treated as the deciding factor. A law which, in pith and substance, falls within the State List will not be a law with respect to a matter in the Concurrent List, although it may *incidentally* deal with such matter. Hence, on the principle laid down by the Privy Council in *Meghraj* v. *Allah Rakhia*,[8] with reference to the corresponding S. 107 of the Government of India Act, 1935, a State law, which, in pith and substance, is covered by the State List, will not be void for repugnancy under cl. (1) of this article, although it may incidentally touch upon a matter in the Concurrent List and be inconsistent with some provision of an *existing law* with respect to that matter.[9]

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[8] 1947 PC 72 [AIR V 34 C 17] : 74 Ind App 12 : 1947 FCR 77 : ILR (1947) Kar (PC) 151 (PC).

[9] 1950 FC 59 (32, 64) (Prs 10, 15) [AIR V 37 C 5] : 1949 FCR 693 : ILR 29 Pat 185 : 51 Cri L Jour 921 (FC), *Lakhi Narayan Das* v. *Province of Bihar.*

1955 Mys 65 (74) (Pr 29) [(S) AIR V 42 C 24] : ILR (1955) Mys 43 (FB), *H. R. Patel* v. *Venkatalakshamma.* (Per Vasudevamurty J.).

1949 Cal 1 (9) (Pr 38) [AIR V 36 C 1] : 50 Cri L Jour 1 : ILR (1949) 2 Cal 94 (FB), *Jnan Prosanna Das Gupta* v. *The Province of West Bengal.* (Harries C. J. (P. 10) thinks that it is "at least doubtful" whether the observations of the Federal Court in AIR 1942 FC 27 that pith and substance rule does not apply to S. 107(1), Government of India Act, 1935, is good law now after AIR 1947 PC 72 (PC). This appears to be also the view of a Bench of Nagpur High Court in AIR 1948 Nag 199).

Note : Meredith C. J. in AIR 1950 Pat 332 has by obvious oversight, stated that it has been pointed out in AIR 1949 Cal 1 at p. 10, Para 45 that doctrine of pith and substance does not apply to S. 107(1), G. I. Act while the exact opposite is stated there.

1949 Mad 307 (314) (Pr 21) [AIR V 36 C 146] : ILR (1949) Mad 377 : 50 Cri L Jour 405 (SB), *Narayanaswami* v. *Inspector of Police.*

(k) Criticism of above view.

Without questioning the fact that, as already stated, the above is now the settled law, it is submitted with respect that the view does not fit in with the grammatical or logical construction of the article or its predecessor, S. 107 of the Government of India Act of 1935.[10]

The point was not argued before the Privy Council in *Meghraj* v. *Allah Rakhia*[11] (as already stated) and counsel who contested the

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1941 Lah 177 (180) [AIR V 28] (FB), *Megh Raj* v. *Allah Rakhia*. (Though the view expressed in this case by the High Court on this point was not approved by the Federal Court in appeal in AIR 1942 FC 27 (FC), yet, the Privy Council in further appeal in AIR 1947 PC 72 (PC) approved the view.)

1955 NUC (Mys) 5377 [AIR V 42], *Hanumanthiah* v. *Puttama*. (The enactment of the Mysore Tenancy Act is clearly within the province of the State Legislature and there is no need for the assent of the President of the Union and the Act is not void for repugnancy to provisions of Transfer of Property Act and Civil P. C. relating to leases).

1953 Pat 87 (91) (Pr 12) [AIR V 40 C 26] : ILR 32 Pat 19 (DB), *Bengal Immunity Co.* v. *State of Bihar*. (Bihar Sales Tax Act is in pith and substance not a law with respect to sale of goods but is a law imposing taxation on sale of goods — The legislation falls entirely within item 54 of State List. Hence Art. 254 has no application although the Act may undoubtedly trench to a certain extent upon items 7 and 8 in the Concurrent List.)

1953 Trav-Co 327 (334, 335) [AIR V 40 C 122] : ILR (1952) Trav-Co 670 (DB), *Vishnu* v. *Poulo*.

1950 Pat 35 (38) [AIR V 37 C 14] : ILR 28 Pat 782 : 51 Cri L Jour 300 (DB), *Bhutnath Ghosh* v. *Province of Bihar*.

1948 Nag 199 (203) (Prs 13, 14) [AIR V 35 C 69] : ILR (1947) Nag 579 : 49 Cri L Jour 230 (DB), *Om Prakash Mehta* v. *Emperor*.

1946 Cal 48 (50) [AIR V 33 C 14] (DB), *Udaychand Mahatab Bahadur* v. *Ajit Kumar Roy*.

1942 Cal 587 (591, 592) [AIR V 29] (DB), *Bir Bikram Kishore* v. *Tafazzal Hossain*.

[**But see** 1955 Pat 1 (30) (Pr 20) [(S) AIR V 42 C 1] : ILR 33 Pat 690 (SB), *Brij Bhukan* v. *S. D. O., Siwan*. (Bihar Land Encroachment Act (1950) which in pith and substance falls under State List is bad for repugnancy to Limitation Act which is an "existing law" with respect to a matter in the Concurrent List — *Note* : Although this view accords with the view that is being urged in this Note as being the correct view, the decision is not correct as it goes against the established law since AIR 1947 PC 72 (PC). It has to be pointed out that though this case is referred to in the judgment in another connection, it has not been referred to on this question, nor is there reference to AIR 1950 FC 59 which is also an authority binding on the Patna High Court].

[10] 1955 Pat 1 (30) (Pr 20) [(S) AIR V 42 C 1] : ILR 33 Pat 390 (SB), *Brij Bhukan* v. *S. D. O. Siwan*. (This Full Bench decision accords with the view urged here in this Note. But the decision has to be characterised as wrong as it goes against AIR 1947 PC 72 (PC) and AIR 1950 FC 59 (FC) — The former is referred to in another connection but not on this question — The latter is not referred to at all).

[11] 1947 PC 72 [AIR V 34 C 17] : 74 Ind App 12 : 1947 FCR 77 : ILR (1947) Kar (PC) 151 (PC).

validity of the Provincial law on the ground of repugnancy, practically conceded the proposition that the repugnancy would not affect the validity of the law if it wholly fell within the powers of the Provincial Legislature under the Provincial List itself without any necessity of the Provincial Legislature drawing on its powers under the Concurrent List. This fact must be remembered in considering the weight to be attached to Lord Wright's observation quoted above.

(l) View not justified by language of Article.

Now, taking the wording of cl. (1), it has already been pointed out that the words "any provision of a law made by the Legislature of a State" are unqualified, while the same words in cl. (2) are qualified by the words "with respect to one of the matters enumerated in the Concurrent List."

(m) Inconsistency with doctrine of "occupied field".

It has already been seen in NOTE 5 that, with regard to the question of repugnancy to a law made by Parliament, it would lead to anomalous results contrary to established canons of interpretation of legislative powers of Federal and State Legislatures, to hold that repugnancy of the State law would affect the validity of the State law, only where the State law dealt, in pith and substance, with a matter in the *Concurrent List*. For, such a proposition would mean that a State law dealing in pith and substance with a matter in the State List but incidentally encroaching on a matter in the Union List would not be void for repugnancy to a Central law dealing with such matter. This result would clearly be contrary to the doctrine of occupied field which is an inseparable concomitant of the doctrine of pith and substance and incidental encroachment, which doctrine, it is established law now in India, is applicable to the interpretation of the legislative powers of the Central and State Legislatures under the Government of India Act, 1935, and under this Constitution. (See ART. 246, Notes 9 and 10.)

Thus, if the doctrine of occupied field is to be held applicable (as it must be), the proposition that the repugnancy of State law to *existing* law will not affect the validity of the State law unless the State law dealt with a matter in the Concurrent List would, in effect, import a qualification with reference to a State law when such law collided with an *existing* law, while that qualification was dispensed with when such law collided with a *Central* law. The *language* of cl. (1) affords no justification for making such a distinction between the two types of cases.

The principle of occupied field will also apply as between a Provincial law with respect to a matter in the Provincial field and a Federal law with respect to a matter in the *Concurrent field*, where the Provincial law deals *incidentally* with the latter matter. Thus, when the conflict is between a Provincial law and a Federal law with regard to a matter in the Concurrent field, the validity of the

Provincial law will be affected even where in pith and substance it falls within the Provincial field. This is the result of the operation of the principle of occupied field.

(n) Repugnancy does not mean that the conflicting laws must fall in same Legislative List.

It may, however, be argued that the repugnancy to an existing law contemplated by cl. (1) is repugnancy to an existing law with respect to a matter in the Concurrent List, while, in the case of repugnancy to a law made by Parliament, the clause does not require for its applicability that the law made by Parliament should be with respect to a matter in the Concurrent List. As repugnancy necessarily implies that the two conflicting provisions are with respect to the *same* matter[12] (it may be argued) it follows as a necessary consequence that the State law also must be with "respect to" a matter in the Concurrent List.

This line of reasoning would involve a fallacy as it would mean that repugnancy is possible only where the competing laws both deal in pith and substance with the same matter, while this is *not* the case. As the doctrine of 'occupied field', already referred to (see Art. 246 Note 10), shows, repugnancy is possible even where a law *incidentally trenches on* a matter which properly forms the subject of another law falling within the legislative field of another Legislature. To the extent of such incidental encroachment a common field is created between the two laws so as to create scope for conflicts between them. (See Art. 246 Note 10.)

Hence, the mere fact that the clause contemplates the repugnancy of a State law to an existing law with respect to a matter in the Concurrent List does not necessarily mean that the State law must in pith and substance fall in the Concurrent field. It is quite possible for a State law, which falls in pith and substance in the State List but *incidentally* touches a matter in the Concurrent List, to be repugnant to an existing law which in pith and substance falls in the Concurrent List. (See also sub-heading Z5.)

(o) Above proposition not contrary to decisions.

The decisions, which have laid down the proposition that, in order to attract the applicability of cl. (1) to a matter of repugnancy between a State law and an existing law, it is necessary that the State law must be with respect to a matter in the Concurrent List, have not denied the possibility of repugnancy in cases in which the State law does not fall in pith and substance under the Concurrent List. If there was no *possibility of repugnancy* in such cases, it would have been unnecessary for them to deal with the *consequences* of the repugnancy and to say that it would not affect the validity of the State law. The above decisions only lay down that such repugnancy will not be covered by cl. (1) and will not affect the validity of the State law.

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[12] *See* 1950 FC 59 (62) (Pr 9) [AIR V 37 C 5] : 51 Cri L Jour 921 : 1949 FCR : ILR 29 Pat 185 (FC), *Lakhi Narayan Das* v. *Province of Bihar.* (The provisions of the impugned Ordinance and those of an existing law must be in respect of the same subject matter and that subject matter must be covered by one of the items in the Concurrent List).
1942 Cal 537 (591) [AIR V 29] (DB), *Bir Bikram Kishore* v. *Tafazzal Hossain.* (Pal J. : "In order to fall within the mischief of S. 107(1) of the Govt. of India Act, 1935, both the Provincial Law and the existing Indian law must be with respect to the same matter and that matter must be 'one of the matters enumerated in the Concurrent Legislative List'.")

Thus, for instance, in *Jnan Prosanna Das Gupta* v. *Province of West Bengal*,[13] the question was as to the validity of the provisions of the West Bengal Security (Amendment) Ordinance which were impugned as being repugnant to certain provisions of the Code of Criminal Procedure. It was held by a Full Bench of the Calcutta High Court that inasmuch as the impugned Ordinance fell in pith and substance within the Provincial List and only incidentally dealt with matters in the Concurrent List, the repugnancy of its provisions to those of the Criminal Procedure Code, which was an "existing Indian law" with respect to a matter in the Concurrent List, would not attract the applicability of cl. (1) of S. 107 of the Government of India Act, 1935, and so would not affect the validity of the provisions of the impugned Ordinance. But it was fully recognized that there *was* a conflict between the provisions of the Ordinance and those of the Criminal Procedure Code and the decision does not proceed on the hypothesis that as the two laws involved fall in pith and substance under two different legislative lists, there *can* be no common ground on which they can converge so as to give rise to repugnancy at all.

Harries C. J. observed as follows in the course of his judgment:

> "There can be no doubt that the provisions of this Ordinance are in conflict with certain provisions of the Code of Criminal Procedure and it appears to me that it would be practically impossible to legislate on preventive detention and with regard to persons subjected to such detention without affecting the provisions of the Code of Criminal Procedure."

Further on in the same judgment,[14] the learned Chief Justice says:

> "In short, it appears to me that it must have been clear to the framers of the Government of India Act that legislation with regard to the matters in Item 1 of the Provincial List might well be repugnant to legislations on items 1 and 2 in the Concurrent Legislative List."

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[13] 1949 Cal 1 (8) (Pr 34) [AIR V 36 C 1] : 50 Cri L Jour 1 : ILR (1949) 2 Cal 94 (FB).

[14] 1949 Cal 1 (9) (Pr 39) [AIR V 36 C 1] : 50 Cri L Jour 1 : ILR (1949) 2 Cal 94 (FB), *Jnan Prosanna Das Gupta* v. *Province of West Bengal.*

Thus, two laws falling, in pith and substance, in two different legislative fields as demarcated by the legislative lists may yet converge and conflict in some places on a common ground so as to give rise to a question of repugnancy. Hence, it would be fallacious to argue that as repugnancy means identity of the matter of legislation between the two conflicting laws and that as cl. (1) only contemplates the repugnancy of a State law to an existing law with respect to a matter in the Concurrent List, it must necessarily follow that the State law must also, in pith and substance, be with respect to a matter in the Concurrent List. (See also sub-heading Z5.)

(p) Competency of legislation does not conclude question of repugnancy.

In *Jnan Prosanna Das Gupta* v. *Province of West Bengal*,[15] referred to above, Harries C. J. observed as follows:

> "Again, legislation with regard to the jurisdiction of the Courts in respect of preventive detention and of persons subjected to such detention might well come in conflict with existing law, e. g., the Letters Patent of this High Court and S. 491, Criminal P. C. Nevertheless, the Provincial Legislature was expressly authorised to legislate on such subjects. If the whole of a piece of legislation is confined to matters within the Provincial Legislative List, can that legislation or any part of it be void for repugnancy because it may come in conflict with *Dominion laws or existing laws applicable to the Dominion* of India, and does a Provincial Act relating to such matters require the assent of the Governor-General to prevent the whole of it or certain provisions in it being void for repugnancy?"

His Lordship's objection seems to be that the Constitution having in such cases, obviously, intended the Provincial law to be valid and competent, it would be incongruous to hold it to be rendered void by *repugnancy*. With the utmost respect to the learned Chief Justice, it does not seem to be correct to treat the *competency* of a piece of legislation as concluding the question of *repugnancy* of such legislation. The two questions have to be kept distinct and it cannot be argued, merely from the fact that the Constitution contemplates the *competency* of a certain piece of legislation, that the Constitution also inculcates that such legislation would be immune from attack on the ground of *repugnancy*.

If competency should conclude the question of repugnancy then *repugnancy* can never vitiate a law which the Legislature is competent to enact. But such a plea would obviously be untenable. For instance, the Provincial Legislature *has power* to make laws with respect to matters in the *Concurrent List*. It cannot be disputed that if there is a conflict between a Provincial law with respect to a matter in the

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[15] 1949 Cal 1 (9) (Pr 36) [AIR V 36 C 1] : 50 Cri L Jour 1 : ILR (1949) 2 Cal 94 (FB).

Concurrent List and an "existing law" or Central law with respect to such matter, the repugnancy would vitiate the Provincial law under clause (1).

Why then should it make a difference merely because the Provincial law falls in the *Provincial List* in pith and substance, so long as there is *admittedly* repugnancy between its provisions and those of a Central law or an existing law?

Moreover, if it is held that in such a case, repugnancy to a Federal law will *not* affect the validity of a Provincial law, because under the Constitution the Provincial law is *intra vires* the Provincial Legislature, it will necessarily mean that the Federal law (if earlier) will, to that extent, be rendered void, so far as the particular Province is concerned, although under the Constitution the Federal law is also *intra vires* the Federal Legislature and is applicable to such Province. This shows how inconclusive the argument based on the Provincial law being *intra vires* under the Constitution is. If it would be incongruous to hold that a Provincial law which is within the powers of the Provincial Legislature is void for repugnancy to a Federal law, would it not be incongruous to hold that a *Federal* law which is within the powers of the Federal Legislature is made void by repugnancy to a Provincial law ?

This difficulty cannot be met by pointing out that the learned Chief Justice was referring to a Provincial law in the *exclusive* Provincial field, because the *Federal* law with which it conflicts may also be one in the *exclusive* Federal field.

In this connection, it has to be pointed out that although his Lordship is referring to a case where "the whole of a piece of legislation is confined to matters within the Provincial Legislative List," he obviously means only a Provincial law which in *pith and substance* falls under the Provincial List and incidentally touches upon a matter in the Federal List, or Concurrent List. For, if there were not even such *incidental encroachment* on the Federal field, there would be no question of the Provincial law "coming into conflict" with any provision of a Federal law. Thus, in the case of a Provincial law conflicting with a Federal law with respect to a matter in the Federal List, the provisions of the Provincial law are held to be open to question only so far as they *overflow into the Federal field* and not with reference to matters exclusively in the Provincial field. It is not clear why it should be felt that there is any anomaly or incongruity in putting restrictions on such "trespassing" provisions.

(See also sub-heading Z3.)

(q) Privy Council authorities examined.

Harries C. J. in the above case proceeded to state that the effect of recent Privy Council decisions was that legislation by Provincial Legislature on matters falling within the Provincial Legislative List was valid though such legislation might also to some extent be regarded as legislation touching matters in the Concurrent Legislative List (and its provisions touching matters in the Concurrent List conflicted with provisions of other laws with respect to such matters). Then his Lordship cited in support of his view the two Privy Council cases of *Prafulla Kumar Mukherjee* v. *Bank of Commerce, Khulna, Ltd.*[16] and *Meghraj* v. *Allah Rakhia.*[17]

(r) *Meghraj* v. *Allah Rakhia*, was based on concession of point by counsel

It has already been mentioned that although the judgment of the Privy Council in *Meghraj* v. *Allah Rakhia*[18] undoubtedly lays down that a Provincial law which has been enacted by a Provincial Legislature purely in the exercise of its powers under the Provincial List, cannot be impeached for repugnancy to an existing law with respect to a matter in the Concurrent List, the point was *conceded* by counsel and was not argued before the Privy Council.

(s) *Prafulla Kumar Mukherjee* v. *Bank of Commerce*, not relevant to point.

As regards the decision of the Privy Council in *Prafulla Kumar Mukherjee* v. *Bank of Commerce Khulna, Ltd.*[19] which Harries C. J., has cited, it is submitted with great respect to the learned Chief Justice that the case does not touch the point in question here.

No doubt, in that case there was a question of repugnancy of a Provincial law to a law dealing with a matter in the *Federal* List, and the Privy Council treated the question of repugnancy as immaterial and as not affecting the validity of the impugned Provincial legislation as such legislation fell in pith and substance within the Provincial field. But to deduce from this that the Privy Council held in that case that a Provincial law which falls in pith and substance within the Provincial List would, in every case, be immune from attack for repugnancy to a law dealing with a *Federal* subject, would be totally erroneous. Such a proposition, which would be directly contrary to the language of SEC. 107 (1) of the Government of India Act, 1935, does not follow from the judgment of the Privy Council in *Prafulla Kumar Mukerjee's case.*[20]

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[16] 1947 PC 60 [AIR V 34 C 14] : 74 Ind App 23 : 1947 FCR 28 : ILR (1947) Kar (PC) 161 (PC).

[17] 1947 PC 72 [AIR V 34 C 17] : 74 Ind App 12 : 1947 FCR 77 : ILR (1947) Kar (PC) 151 (PC).

[18] 1947 PC 72 [AIR V 34 C 17] : 74 Ind App 12 : 1947 FCR 77 : ILR (1947) Kar (PC) 151 (PC).

[19] 1947 PC 60 [AIR V 34 C 14] : 74 Ind App 23 : 1947 FCR 28 : ILR (1947) Kar (PC) 161 (PC).

[20] 1947 PC 30 [AIR V 34 C 14] : 74 Ind App 23 : 1947 FCR 28 : ILR (1947) Kar (PC) 161 (PC), *Prafulla Kumar Mukherjee* v. *Bank of Commerce, Khulna.*

In that case the question was about the validity of the Bengal Money-Lenders Act of 1940, which was impugned as being repugnant to the provisions of the Negotiable Instruments Act of 1881, which was an "existing Indian law" and not a 'Federal' law. In so far as the Bengal Act might be regarded as repugnant to the provisions of the Negotiable Instruments Act which fell under the Concurrent List, the repugnancy was cured by the Bengal Act having been reserved for, and having received the assent of, the Governor-General under cl. (2) of SEC. 107 of the Government of India Act of 1935. But in so far as the provisions of the Bengal Act might be regarded as repugnant to the provisions of the Negotiable Instruments Act which fell under the *Federal List*, such repugnancy was *not* covered by cl. (1) of SEC. 107 at all, and would not invalidate the Provincial law inasmuch as the Negotiable Instruments Act was not a *Federal* law but *an existing Indian law*, and in the case of an existing Indian law, the repugnancy of a Provincial law to such existing law would affect the validity of the Provincial law only where the existing law fell in the Concurrent List and not where it fell in the Federal or Provincial List. Therefore, in the case before the Privy Council in *Prafulla Kumar Mukherjee's case*,[21] the repugnancy of the Bengal Act to the provisions of the Negotiable Instruments Act with respect to matters in the Federal Legislative List *could not* affect the validity of the Bengal Act at all, on the terms of SEC. 107 (1) of the Government of India Act, 1935, and hence, the question that arose in regard to the validity of the Bengal Act in that case was not a question of *repugnancy* at all but was a *pure* question of legislative *competency* and this question was concluded in favour of the validity of the legislation by the fact that in pith and substance it fell within the Provincial List. That is the reason why their Lordships of the Privy Council in *Prafulla Kumar's case*[22] have not gone beyond considering whether the impugned Provincial Act fell in pith and substance within the Provincial List. From this it certainly could not be inferred that their Lordships held that if the Provincial Act fell in pith and substance in the Provincial field, it is immune from all attacks for repugnancy to another law falling under another Legislative List.

(t) Argument that as clause (1) is 'subject to' clause (2), it only covers the same kind of cases.

Another argument which has been used in support of the theory that cl. (1) does not apply to cases in which the impugned Provincial law falls in pith and substance within the Provincial List and not the Concurrent List is that the provisions of cl. (1) are stated to be subject to those of cl. (2), and cl. (2) refers only to cases in which the impugned Provincial Act is with respect to one of the matters enumerated in the Concurrent List, that is, falls in pith and substance in the Concurrent List.

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[21] 1947 PC 60 [AIR V 34 C 14] : 74 Ind App 23 : 1947 FCR 28 : ILR (1947) Kar (PC) 161 (PC), *Prafulla Kumar Mukherjee* v. *Bank of Commerce, Khulna.*

[22] 1947 PC 60 [AIR V 34 C 14] : 74 Ind App 23 : 1947 FCR 28 : ILR (1947) Kar (PC) 161 (PC), *Prafulla Kumar Mukherjee* v. *Bank of Commerce, Khulna.*

This argument first found expression in the judgment of Radha Binod Pal J., in *Bir Bikram Kishore* v. *Tafazzal Hussain.*[23] In that case, Pal J., observed as follows with reference to the corresponding S. 107 of the Government of India Act, 1935 :

> "In my opinion, the two sub-sections must be read together. In order to fall within the mischief of S. 107 (1), Government of India Act, 1935, both the Provincial law and the existing Indian law must be with respect to the same matter and that matter must be 'one of the matters enumerated in the Concurrent Legislative List.' Sub-section (1) declares a provision to be void 'subject to the provisions of this section.' The invalidity imposed by sub-s. (1) will not attach to the provisions if the Provincial law in question is passed in the manner contemplated by sub-s. (2). In my opinion, therefore, only that kind of Provincial law is contemplated by sub-s. (1) as is covered by sub-s. (2). Sub-section (2) clearly contemplates only a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List."

The same argument was adopted by Rajamannar C. J., in *Narayanaswami Naidu* v. *Inspector of Police,*[24] in which the learned Chief Justice observed as follows :

> "In my opinion, sub-ss. (1) and (2) of S. 107 must be read together, and so read, they both deal with matters enumerated in the Concurrent Legislative List, and inconsistency between Provincial law on the one side and Dominion law and existing law on the other with respect to such matters. In my view, the words 'subject to the provisions of this section' which occur in sub-s. (1) of S. 107 support this construction. These words would have no meaning if sub-s. (2) is dealing with something completely different from sub-s. (1). The relative rights and disabilities of Provincial and Dominion Legislatures with respect to Lists 1 and 2 are dealt with in S. 100 of the Act and S. 107 deals only with conflicts which may arise in respect of matters in the Concurrent List. I agree respectfully with the following observations of Pal J., in *Bir Bikram Kishore* v. *Tafazzal Hossain.*[25]"

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[23] 1942 Cal 587 (591) [AIR V 29] (DB).

[24] 1949 Mad 307 (314) (Pr 21) [AIR V 36 C 146] : ILR (1949) Mad 377 : 50 Cri L Jour 405 (SB).

[25] 1942 Cal 587 (591) [AIR V 29] (DB).

Here the learned Chief Justice quoted from the judgment of Pal J. in *Bir Bikram Kishore's case*[26] which has already been quoted above.

With very great respect to both the learned Judges, their reasoning, as set out in the two passages quoted above, does not seem to be cogent. The fact that cl. (1) is made subject to the provisions of cl. (2), no doubt, means that cl. (1) *includes* the type of cases contemplated by cl. (2). But it is not clear how the two learned Judges deduced from this the result that cl. (1) *is confined* to cases contemplated by cl. (2). Clause (2), no doubt, indicates that by following a particular procedure the consequence mentioned in cl. (1) may be avoided. But it certainly does not follow from this that this procedure must be applicable to *every type of case* mentioned in cl. (1). Clause (1) may cover a certain number of cases and may lay down a general rule as regards such cases. Clause (2) may *select* some of these cases and provide that in regard to *them*, the operation of cl. (1) may be avoided by following a certain procedure. It is not necessary that clause (2) *must* make this special procedure applicable to *all* the cases to which cl. (1) refers.

Thus, the mere fact that the operation of cl. (1) is made subject to the provisions of cl. (2) does not justify the view that cl. (1) will not come into operation at all in a case not covered by cl. (2) and that, therefore, a Provincial law which falls in pith and substance within the Provincial and not in the Concurrent List will be immune from attack on the ground of repugnancy under cl. (1) even though its provisions may *actually* conflict with the provisions of a law falling under the Concurrent List.

The above view receives support from the observations of Dhavle J., in *Sadanand Jha* v. *Aman Khan*.[27] In that case which related to Section 107 of the Government of India Act of 1935, it was argued that sub-sect. (1) of S. 107 was limited to repugnancies in the concurrent field and that the conflicting provisions of law must all fall within the Concurrent List if the provisions of sub-sect. (1) of S. 107 should come into play at all. This argument was based on the assertion that the expression "subject to the provisions of this section" in sub-sect. (1) had the effect of making the repugnancies dealt with in sub-sect. (1) identical with those dealt with in sub-s. (2). In rejecting this contention Dhavle, J., observed as follows :

> "The construction contended for is opposed to the plain grammar of the sub-section, and there is nothing in the scheme of legislation laid down in the Act (Government of India Act, 1935)

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[26] 1942 **Cal** 587 [AIR V 29] (DB), *Bir Bikram Kishore* v. *Tafazal Hossain.*

[27] 1939 **Pat** 55 (65) [AIR V 26] (FB).

to indicate that Parliament intended it. As we have already seen, the enumeration of items in the three lists itself makes it far from improbable that conflicts of legislative provisions would arise in other fields no less than in the Concurrent field; and there is no reason to suppose that Parliament intended to leave the former to the operation of S. 100 alone with its qualifications of 'notwithstanding' and 'subject to.' Further, if Parliament had intended to provide in sub-s. (1) of S. 107 for conflicts in the Concurrent field alone, it could easily have done so by adopting the language of sub-s. (2), which is unmistakably confined to action in the Concurrent field. Nor can I agree that the expression 'subject to the provisions of this section' in sub-s. (1) has the effect of confining the conflicts dealt with in this sub-section to conflicts in the Concurrent field. That expression no doubt refers to sub-s. (2) which is confined to legislation in the Concurrent field. But is the provision of this exceptional procedure for the Concurrent field any reason for supposing that Parliament either was not aware of or decided to ignore possible conflicts between Provincial legislation in the exclusive field and the Federal or the existing Indian law in the Concurrent field ?"

With great respect, the above observations of Dhavle J. are cogent and convincing.

(u) Failure to notice relevant authorities.

Neither in the judgment of Pal J. nor in that of Rajamannar C. J. is there any reference to the judgment of Dhavle J. although it is so clinchingly against the view taken by them.

It may also be noted that there is no reference in Rajamannar C. J.'s judgment in *Narayanaswami Naidu's case*[28], to the judgment of the Privy Council in *Meghraj* v. *Allah Rakhia*[29] although it clinches the point and directly supports the stand taken by him.

(v) Erroneous conception as to relative scope of Articles 246 and 254.

The observation made by Rajamannar C. J. in *Narayanaswami Naidu's case*[30] in the passage quoted above that "the relative rights and disabilities of Provincial and Dominion Legislatures with respect to Lists 1 and 2 are dealt with in S. 100 of the Act (Government of India Act, 1935) and S. 107 deals only with conflicts which may arise in respect of matters in the Concurrent List," also requires to be commented on as not being correct. In this connection also, the observations of Dhavle J. in *Sadanand Jha* v. *Aman Khan*,[31] already quoted above may be referred to. (See also the criticism of observations of Iqbal Ahmad J. in *Atiqa Begam* v. *Abdul Maghni*[32] in NOTE 5.)

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[28] 1949 Mad 307 [AIR V 36 C 146] : ILR (1949) Mad 377 : 50 Cri L Jour 405 (SB), *Narayanaswami Naidu* v. *Inspector of Police.*

[29] 1947 PC 72 [AIR V 34 C 17] : 74 Ind App 12 : 1947 FCR 77 : ILR (1947) Kar (PC) 151 (PC).

[30] 1949 Mad 307 [AIR V 36 C 146] : ILR (1949) Mad 377 : 50 Cri L Jour 405 (SB), *Narayanaswami Naidu v. Inspector of Police.*

[31] 1939 Pat 55 [AIR V 26] (FB).

Further, as stated above while commenting on the observations of Harries C. J., in *Jnan Prosanna Das Gupta* v. *The Province of West Bengal*[33] (see under sub-heading (p)), a clear distinction must be made between the questions of repugnancy and competency. The fact that the Legislature has been given the *power to legislate* on a particular subject does not mean that its legislation on such subject cannot be called in question on the ground of *repugnancy* to another law. Section 100 of the Government of India Act, 1935, (corresponding to ART. 246) has nothing to do with the question of *repugnancy*. It is only concerned with the question of legislative *competency*. It is, therefore, erroneous to hold that S. 100 and not S. 107 covers questions of *repugnancy* in regard to matters falling in Lists 1 and 2.

No doubt, the doctrine of 'occupied field' will apply to repugnancies with regard to such matters and that doctrine forms *part* of the doctrine of pith and substance and incidental encroachment which applies to the interpretation of legislative entries, which subject is covered by ART. 246. But this does not mean that Art. 246 (corresponding to Government of India Act, S. 100) contains the *statutory expression* of the doctrine of occupied field as applied to questions of repugnancy in matters covered by Lists 1 and 2. As noted in ART. 246, NOTE 10, the statutory embodiment of the doctrine of occupied field in India is found in *this* article. It has already been explained in NOTE 5 that there is no point in adopting a construction of this article which is opposed to its natural, grammatical and logical interpretation and restricting its operation so as to exclude therefrom questions of repugnancies with reference to matters in Lists 1 and 2, and falling back on general principles to resolve repugnancies while the general principles have been embodied in statutory form in this article.

(w) Scope of Article 246 distinct from that of this article.

From the above discussion, it will be clear that on the logical interpretation of this article and ART. 246 according to the grammatical construction of the language employed in the two provisions, each of the two articles has a *distinct scope* of its own. Article 246 deals with the question of *competency* of the Central and State Legislatures to make laws on various subjects. That article has nothing to do with the question of *repugnancy* between the laws that may be made by different Legislatures. This question forms exclusively the subject-matter of this article.

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[32] 1940 All 272 (277) [AIR V 27] (FB).

[33] 1949 Cal 1 [AIR V 36 C 1] : 50 Cri L Jour 1 : ILR (1949) 2 Cal 94 (FB).

(x) Repugnancy due to same matter occurring in more than one Legislative List.

Article 246, no doubt, visualizes the contingency of the same matter falling within more than one list. In such cases of overlapping the article provides by the *non obstante* clause the order of priority between the Central and State Legislatures as regards their power of legislating on the matter in question *but this provision as to priority is not concerned with the question of repugnancy between the laws passed by the two Legislatures.*

It is only concerned with the *power* of either of the Legislatures to make a law on the particular subject. When the same matter falls both in the Union and the State Lists, the *exclusive* power of making laws with respect to that matter is vested in the Parliament and not in the State Legislature. In other words, in such a case it is only the Parliament which can make a law on the subject and not a State Legislature. Therefore, there can be only one law on the subject which can be *validly* passed and as repugnancy connotes two laws which are inconsistent with each other and which have been *competently* passed, there is no occasion for any question of repugnancy to arise at all in such a case. Where a matter falls *both* in the Union List and the State List, and there is a Central law with respect to that matter, a State law with respect to the same matter, which is repugnant to the Central law, will be void as being *ultra vires* the State Legislature and not on the ground of repugnancy to the Central law.

(y) Repugnancy between laws with respect to matters in different Legislative Lists.

Apart from the cases in which the *same matter* may occur in more than two legislative lists so as to bring into play the *non obstante* clause in ART. 246, there may be cases in which the Parliament or the State Legislature in legislating in pith and substance with respect to a matter in its allotted field incidentally touches upon a matter in another legislative field. In such cases, according to the doctrine of pith and substance and incidental encroachment, the law is treated as *intra vires* and as falling entirely within the legislative field of the particular Legislature which has made the law.

So far, the matter is covered by ART. 246. Thus the doctrine of pith and substance is useful for the purpose of stretching the legislative powers of a Legislature so as to embrace incidental matters. But if the incidental provisions of the law made by a particular Legislature, which (provisions) thus are allowed to trespass into the field of another Legislature, conflict with the provisions of a law made by the latter Legislature with regard to a matter in its own field, a question of repugnancy arises.

(z) Such repugnancy not curable by applying non obstante clause in Article 246 or doctrine of pith and substance.

This question cannot be resolved by invoking the *non obstante* clause in ART. 246 as it is not a case of the same matter occurring in both the Federal and Provincial Legislative Lists. Nor can reliance be placed on the doctrine of pith and substance in such a case. In other words, it cannot be argued on the strength of the doctrine of pith and substance that notwithstanding the repugnancy, the incidental provisions of the trespassing legislation will prevail as against the provisions of the law made by the Legislature into whose field the trespass has taken place.[34]

(z1) Meaning of dictum that question of pith and substance does not arise under this article.

It is this latter principle which, it is submitted, was expressed by Varadachariar J., delivering the judgment of the Federal Court, in *Meghraj* v. *Allah Rakhia*[35] in which he observed as follows :

> "In the judgment of the High Court there is some discussion of the question of the pith and substance of the Act. But that question does not arise when objection is taken not under S. 100, Constitution Act, 1935, but under S. 107 (1)."

In other words, his Lordship obviously meant that an objection on the ground of repugnancy of a Provincial law to another law cannot be met by appealing to the doctrine of pith and substance and by pleading that according to that doctrine the impugned Provincial legislation is perfectly competent and within the powers of the Provincial Legislature.[36] (See also sub-heading Z5.)

These observations have sometimes been misunderstood[37] and on account of such misunderstanding have been treated as not laying down the correct law. It seems to have been assumed that Varadachariar, J., meant by his observations that the doctrine of pith and substance cannot be applied in determining the question whether a Provincial law or an existing law or a law made by Parliament is "with respect to one of the matters enumerated in the Concurrent List" within the meaning of this expression in S. 107 of the Government of India Act, 1935. Such is not the meaning of the observations of Varadachariar, J. above quoted. The doctrine of pith and substance is certainly applicable to the question whether for the purpose of S. 107, Government of India Act, or this article a certain law is "with respect to" one of the matters enumerated in the Concurrent List. There is no reason to suppose that Varadachariar J. meant to deny this proposition.

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[34] 1942 FC 27 (30) [AIR V 29] (FC), *Megh Raj* v. *Allah Rakhia*.
1950 Pat 332 (336, 337) [AIR V 37 C 88] : 51 Cri L Jour 1251 : ILR 29 Pat 410, *Ratan Roy* v. *State of Bihar*. (Per Meredith C. J. : As the restrictions in Art. 254 are as to particular provisions and not as to laws as a whole, there is obviously no room for the application of the doctrine of pith and substance which relates to the general purpose of the law — Meredith C. J.'s reliance upon AIR 1947 PC 60 (PC) and AIR 1949 Cal 1 (10) is evidently due to oversight — The former does not touch the point — The latter says directly the opposite of what Meredith has attributed to it and this occurs in the very page and paragraph quoted by Meredith C. J.).

[35] 1947 PC 72 (74) [AIR V 34 C 17] : 74 Ind App 12 : 1947 FCR 77 : ILR (1947) Kar (PC) 151 (PC).
[*See also* 1955 Trav-Co 220 (223) (Pr 13) [(S) AIR V 42 C 88] : 1955 Cri L Jour 1289 (FB), *P. K. Velayudhan, In re.* (The pith and substance rule has nothing to do with the questions which arise under S. 107 (1), Government of India Act, 1935, or under Art. 254 of the Constitution.)]

[36] *See* 1955 Pat 1 (29) (Pr 19) [(S) AIR V 42 C 1] : ILR 33 Pat 690 (SB), *Brij Bhukan* v. *S. D. O. Siwan.* (In this case, Narayan J. has also taken the same view about the dictum of the Federal Court in *Megh Raj* v. *Allah Rakhia,* AIR 1942 FC 27 (FC), as has been taken in this Note).

[37] *See* 1949 Cal 1 (10) (Pr 45) [AIR V 36 C 1] : 50 Cri L Jour 1 : ILR (1949) 2 Cal 94 (FB), *Jnan Prosanna Das Gupta* v. *The Province of*

What the learned Judge obviously meant was that merely because, by the application of the doctrine of pith and substance, a law made by a certain Legislature is held to fall within the powers of that Legislature and to be a competent piece of legislation, it does not follow that any repugnancy that may exist between the provisions of such legislation and those of another piece of legislation passed by another Legislature acting within the ambit of *its* own powers, would be *ipso facto* cured.

(z2) How far is the dictum good law.

This *general* position, it is submitted, is obviously sound. But, in so far as Varadachariar, J.'s observation implies that although a Provincial law falls, in pith and substance, within the Provincial List, yet it can be impeached, under S. 107 (1) of the Government of India Act, 1935, for repugnancy to an existing Indian law with respect to a matter in the Concurrent List (where such Provincial law *incidentally* touches on the same matter), his observation must be regarded as overruled by the view of the Privy Council on appeal in the same case and as not representing the settled law now.

But cl. (1) deals with *two* kinds of repugnancy (i) with regard to a law made by Parliament, and (ii) with regard to an existing law. The question of repugnancy of a Provincial or State law to a *Federal law* or a law made by Parliament is not affected by the above authorities. Hence, in such cases the general principle pointed out by Varadachariar, J. will apply and the impugned Provincial law need not be in pith and substance with respect to a matter in the *Concurrent* List in order to attract the provisions of cl. (1) of this

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West Bengal. (The remarks of Harries C. J. in this case indicate that he thought that the observations of the Federal Court in AIR 1942 FC 27 threw doubt on the proposition that doctrine of pith and substance might be relied on to test whether a Provincial Act was with respect to a matter in the Provincial List).

article. In other words, even though the impugned Provincial law falls in pith and substance in the *Provincial field*, its repugnance to a Federal law will invalidate the Provincial law.

In such a case, it cannot be argued that because on the principle of pith and substance the Provincial law is *intra vires* the Provincial Legislature notwithstanding its trespass into the Federal field, the trespassing provisions must be upheld even though they may conflict with a Federal law. In this sense, and to this extent, the statement that the doctrine of pith and substance is not applicable when objection is taken under this article and not ART. 246 is not only *correct* but also *good law*. (See also NOTE 5.)

(z3) Repugnancy of Provincial law to Federal law in matter outside Concurrent field.

In *Jnan Prosanna Das Gupta* v. *The Province of West Bengal*,[38] there are observations of Harries, C. J. which seem to suggest that even as regards repugnancy to a *Federal* law, a Provincial law will not be bad for such repugnancy if it falls in pith and substance in the Provincial field. The learned Chief Justice observed as follows in that case :

> "If the whole of a piece of legislation is confined to matters within the Provincial Legislative List, can that legislation or any part of it be void for repugnancy, because it may come in conflict with Dominion laws or existing laws applicable to the Dominion of India, and does a Provincial Act relating to such matters require the assent of the Governor-General to prevent the whole of it or certain provisions in it being void for repugnancy ?"

With very great respect to the learned Chief Justice, if there is not sufficient ground for importing the condition as to the Provincial law falling in the Concurrent field in order to attract the applicability of cl. (1) to repugnancy between a Provincial law and an *existing Indian law*, although this may be the settled position now since the decision of the Privy Council in *Megh Raj* v. *Allah Rakhia*,[39] there is not even a vestige of ground for importing such a condition into cl. (1) as regards a repugnancy between a Provincial law and a *Federal law*.

Moreover, it is not clear what incongruity there is in requiring the Governor-General's assent to a Provincial law within the Provincial field when it *conflicts with* a Federal law or an existing Indian law.

Nor can it be disputed that the authority of a Provincial Legislature to make laws with respect to a matter in the Concurrent List is as plenary as its authority to make laws in respect to a matter in the Provincial field. If there is no incongruity in requiring the Governor-

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[38] 1949 Cal 1 [AIR V 36 C 1] : 50 Cri L Jour 1 : ILR (1949) 2 Cal 94 (FB).

[39] 1947 PC 72 [AIR V 34 C 17] : 74 Ind App 12 : 1947 FCR 77 : ILR (1947) Kar (PC) 151 (PC).

General's assent for securing the validity of a Provincial law with respect to a matter in the Concurrent field which conflicts with the provisions of an existing Indian law dealing with a matter in that field, it is not clear what incongruity his Lordship felt in requiring the Governor-General's assent for securing the validity of a Provincial law, which, although falling in pith and substance in the Provincial field, extended to matters in the Concurrent field or Federal field and in regard to such matters conflicted with the provisions of an existing Indian law or a Federal law. (See also sub-headings (p) and (Z5).

(z4) Repugnancy between Provincial law falling under Provincial List and existing law falling under Concurrent List—Settled law unsatisfactory—Need for Supreme Court decision.

But the question before his Lordship was only about the repugnancy between a Provincial law and *an existing Indian law* dealing with a matter in the Concurrent List, and in regard to this question the law, as expounded by his Lordship (viz., that the repugnancy will not be material if the Provincial law is covered by the Provincial List) falls within the line of the Privy Council decision in *Meghraj* v. *Allah Rakhia*.[40]

But as already explained in detail, even this limited proposition is not sound. It is contrary to the plain, grammatical construction of the article and as the above discussion will show, while the Privy Council decision in *Megh Raj* v. *Allah Rakhia*[41] does not discuss the point at all but merely expresses its approval of a view which counsel on both sides *assumed* to be the correct one, the reasons given in the other cases in support of the proposition are not convincing or cogent. Hence, the matter calls for an authoritative pronouncement from the Supreme Court when the occasion should arise.

(z5) Repugnancy between State and Union laws in matters outside Concurrent List—Article is applicable—Criticism of contrary decisions.

The relative scope of ART. 246 and this article on the question of 'repugnancy' has already been considered above while discussing the question whether it is essential, for cl. (1) of this article to come into play with reference to a repugnancy between a State law and an "existing law" with respect to a matter in the Concurrent List, that the State law also must, in pith and substance, deal with a matter in the Concurrent List. (See sub-headings v to Z1.) In this connection, reference has been made to the observations of Rajamannar C. J. in *Narayanaswami Naidu* v. *Inspector of Police*[42] to the effect that the relative rights and disabilities of Dominion and Provincial Legislatures with respect to Lists 1 and 2, are dealt with in S. 100 of the Government of India Act, 1935 (corresponding to ART. 246) and that S. 107 (corresponding to this article) deals only with conflicts which may arise in respect of matters in the Concurrent List. It has also been explained that these observations do not express the correct position.

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[40] 1947 PC 72 [AIR V 34 C 17] : 74 Ind App 12 : 1947 FCR 77 : ILR (1947) Kar (PC) 151 (PC).

[41] 1947 PC 72 [AIR V 34 C 17] : 74 Ind App 12 : 1947 FCR 77 : ILR (1947) Kar (PC) 151 (PC).

[42] 1949 Mad 307 [AIR V 36 C 146] : ILR (1949) Mad 377 : 50 Cri L Jour 405 (SB).

Rajamannar C. J., however, is not alone in his view that S. 100 of the Government of India Act, 1935, (corresponding to ART. 246) is *exhaustive* on the question of repugnancy between a Provincial law and a Federal law in regard to matters in List 1 and List 2. A similar view was expressed by Iqbal Ahmad J. in *Atiqa Begum* v. *Abdul Maghni*[43] in a passage which has been quoted and criticised in NOTE 5. A somewhat similar view was also expressed by Harries C. J. in *Jnan Prosanna Das Gupta* v. *The Province of West Bengal*,[44] and this has already been commented on above under sub-headings (p) and (Z3) above.

The essential weakness in the above view is the failure of the learned Judges to appreciate that S. 100 of the Government of India Act, 1935, (corresponding to ART. 246) covers *only one* kind of repugnancy between Federal and Provincial laws in matters covered by the Federal and Provincial Lists. This type of repugnancy is caused by the same matter occurring in both the Federal and Provincial Legislative Lists, so that both the Federal and Provincial Legislatures have, prima facie, the power to make laws on such matter.

In such a case, the *non obstante* clause vests the exclusive legislative power with respect to the matter in the Federal Legislature and the Provincial law is void as being *ultra vires* the powers of the Provincial Legislature. The *non obstante* clause, therefore, can be said to resolve, in a sense, the repugnancy in such a case. But it must be noted that what causes the invalidity of the Provincial law, in such a case, is not the *presence* of the Federal law to which it is repugnant. Even if there were no Federal law in existence, the Provincial law would be void as *ultra vires* the Provincial Legislature. Hence, really speaking, what affects the validity of the Provincial law is not the *repugnancy* to a Federal law but the fact that in such a case the Provincial Legislature has no jurisdiction at all to make a law on a particular matter. Hence, strictly speaking, even in those cases in which the same matter occurs both in the Federal and Provincial Legislative Lists so as to make possible inconsistent Federal and Provincial laws, the question involved is really not one of *repugnancy* but of legislative competency which is quite a distinct matter altogether.

But apart from this the school of opinion, above referred to, is basically wrong in the assumption that repugnancy is possible only between two laws which *in pith and substance* deal with the same matter. If this assumption were correct, no doubt, their Lordships' view that in matters covered by the Federal and Provincial Lists, the question of repugnancy between the Federal and Provincial laws is wholly covered by S. 100, Government of India Act, 1935, (corresponding to ART. 246) would also be correct. But, with great respect, this assumption is not correct. It fails to draw the distinction between a matter with which, in *pith and substance*, a law deals and a matter in respect of which such law *conflicts* with another law. The very doctrine of pith and substance involves as a necessary implication the existence of a matter with which a law deals, *not in pith and substance but incidentally*. Hence, although a Federal law and a Provincial law may, in *pith and substance*, deal with two distinct matters, yet, one of the two laws may *incidentally* deal with a matter which is dealt with by the other law. Thus, repugnance is quite conceivable between two laws which in *pith and substance* deal with distinct matters.

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[43] 1940 All 272 [AIR V 27] (FB).

[44] 1949 Cal 1 [AIR V 36 C 1] : 50 Cri L Jour 1 : ILR (1949) 2 Cal 94 (FB)

No doubt, repugnancy *does* mean that the two conflicting laws deal with the *same matter*. Otherwise, there would be no repugnancy. But repugnancy does not necessarily mean that the two conflicting provisions must, in *pith and substance*, deal with the same matter. Even where one of them deals with a matter in *pith and substance*, and the other deals with it only *incidentally*, the two laws would nevertheless be dealing with the *same* matter. This is quite enough to create scope for 'repugnancy'. (See also sub-headings (n) and (o).)

If this latter kind of repugnancy should arise between a Federal law and a Provincial law, there would be no scope for the applicability of the *non obstante* clause in S. 100, Government of India Act, 1935, (corresponding to ART. 246) as the law would not be dealing, in pith and substance, with the same matter falling in two different legislative lists and the *non obstante* clause is meant to provide for cases in which in pith and substance the same matter occurs in the Federal List and the Provincial List. That means that the repugnancy in such a case cannot be resolved by the application of the provisions of S. 100, so that it cannot be said that those provisions *exhaustively* deal with all possible cases of repugnancy between Provincial and Federal laws in matters outside the Concurrent List. The repugnancy that is caused by the operation of the doctrine of pith and substance and incidental encroachment, which enables a Legislature, while legislating in pith and substance on a matter in its own field, to incidentally touch upon a matter in the field of another Legislature, and thereby makes it possible for a conflict to arise between two laws made by two different Legislatures, with respect to matters in their own respective fields, is thus *not* dealt with by ART. 246 but forms the subject-matter of this article. With great respect, this aspect seems to have been overlooked by the learned Judges who have expressed the view that S. 100 of the Government of India Act, 1935, (corresponding to ART. 246) fully covers the question of repugnancy between Federal and Provincial laws in matters in the Federal and Provincial Lists.

The dictum of the Federal Court in *Megh Raj* v. *Allah Rakhia*[45] that the doctrine of pith and substance has no relevance, when objection is taken under S. 107 of the Government of India Act and not S. 100, has already been discussed above. (See sub-headings (Z1) and (Z2). That dictum, it has been explained, expresses a *correct* view, and only means that repugnancy of a Provincial law cannot be validated merely on the plea that the Provincial law falls in pith and substance within the Provincial field and is *intra vires* the Provincial Legislature.

The above dictum may also be vindicated as meaning that the doctrine of pith and substance does not apply to the question whether two laws deal with the *same* matter for purposes of *repugnancy* (as distinct from competency). In other words, two laws may be held to deal with the *same matter* for purposes of *repugnancy*, though in *pith and substance* they deal with *different* matters and only *incidentally* deal with the same matter. The doctrine of pith and substance is only applicable for determining the true subject-matter of an enactment for the purpose of seeing under which legislative head it properly falls.

An objection may be posed in the following form to the above view :

The pith and substance of a legislation means its *true* character and subject-matter. Therefore, when a Provincial law falls in pith and substance within the Provincial List and only incidentally trenches upon a matter in the Federal List, this necessarily means that the *true* subject-matter of the Act is the matter in the Provincial List and not that in the Federal List upon which the law incidentally trenches. Hence, there can be no common field so as to give scope for repugnancies to arise between such Provincial law and a Federal law which deals with the matter in the Federal List.

This line of reasoning also involves a fallacy. It assumes that when it is said that in pith and substance a law deals with a certain matter but incidentally trenches on another matter, the law must be treated as *not* dealing with the latter matter at all. In other words, the subsidiary aspects of a law are sought to be treated as though *non-existent*, by this point of view. But an aspect of a law cannot cease to exist merely because it happens to be a subsidiary aspect as distinguished from a dominant aspect. So long as such subsidiary aspect, therefore, continues to be in existence, it *does* form part of subject-matter of the Act, although in a subsidiary sense. Hence, when another law deals with the same matter it will be traversed by both the laws so as to make possible conflicts relating to the same matter between the two laws.

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[45] 1942 FC 27 [AIR V 29] (FC).

Thus, the principle of pith and substance does not mean that the subsidiary aspects of law cease to exist altogether. Only they are not taken into account for certain purposes, namely, the determination of the question whether the law falls within the legislative jurisdiction, as regards subject-matter, of the particular Legislature. But repugnancy has to do with the *operation* of a law and when a law begins to operate, it is not only the dominant aspects of the law that operate but also the subsidiary aspects. Hence, even an inconsistency between two laws in regard to a matter which is only dealt with incidentally by one of the laws is sufficient to create conflicts in the operation of the two laws so as to cause a deadlock unless the deadlock is resolved by some rule.

But it is obvious that *so far as the different matters dealt with in pith and substance by the two Acts are concerned*, there can be no question of repugnance.[46] (See also NOTE 15.)

It will be well to note in this connection that the conflict cannot be avoided by merely saying that conflicts cannot arise in such cases. All that can be done is to say that a certain provision of law or of the Constitution applies or does not apply to the conflict. For instance, it may be stated that cl. (1) of this article does not apply, in which case it will only mean that the conflict cannot be resolved in the manner laid down in cl. (1). It cannot mean that the conflict does not exist at all.

It may also be added that the established principle of construction of the entries in the legislative lists is that as far as possible an attempt should be made to reconcile and harmonize all the entries so as to give effect to all of them and reduce to the minimum the necessity for resort to the *non obstante* clause in ART. 246. This necessarily means that the value of ART. 246 as providing a remedy for *repugnancy* between Federal and Provincial laws is almost theoretical, so that the bulk of the cases in which repugnancy between Provincial and Federal laws is conceivable would fall outside the scope of ART. 246 and if it were held that ART. 246 deals *exhaustively* with all questions of repugnancy between Federal and Provincial laws in matters covered by Lists 1 and 2, the result would be that there would be no provision in the Constitution for dealing with the question of repugnancy between Federal and Provincial laws in a vast majority of cases in which such a question is bound to arise. The repugnancy would have to be resolved, if at all, only by the application of the general principle of occupied field, while ignoring the specific provisions of this article which give exact statutory expression to the same principle. This procedure seems, on the face of it, to be otiose.

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[46] *See* 1949 FC 81 (88) (Pr 19) [AIR V 36 C 13] : 1948 FCR 207 (FC), *Ralla Ram* v. *Province of East Punjab*. (This decision must be regarded as falling under this principle).

It has already been pointed out that if it is held that this article is *limited* in its operation to repugnancies between laws which fall, in pith and substance, under the Concurrent List, the result would be inconsistent with the principle of 'occupied field' which is a *part* of the doctrine of pith and substance. So the question discussed above involves also the question whether the principle of occupied field is applicable to the Constitution Act of 1935 and the present Constitution. As already indicated, the doctrine of pith and substance virtually means a *stretching* of the legislative powers of a Legislature so as to cover matters in the legislative field of *another* Legislature. That being so, there seems no reason why the doctrine should not be accepted as a *whole* and why there should be any objection to accept the *exception* to the doctrine which is contained in the principle of occupied field. The acceptance of such exception in no way involves any curtailment of the legislative powers of a State Legislature in its own allotted field. In this connection, the following observations of Sulaiman J. in *Subrahmanyam Chettiar* v. *Muttuswami Goundan*[47] may be quoted:

> "At the same time, it would be dangerous to import only a part of the doctrine (doctrine of pith and substance) and exclude another part. Partial application may frustrate the very object for which the rule of law was deduced. The two doctrines of incidental encroachment and unoccupied field are closely related. I would go further and say that they are indissolubly connected. We cannot import the doctrine of incidental encroachment in favour of the Provinces, and refuse to import the doctrine of unoccupied field which is in favour of the Centre. The two must go hand in hand. To allow Provincial Legislatures to encroach upon the exclusive Federal field, even though in an indirect way, when there is a Central legislation already occupying the field, would be to give the former a free hand in nullifying Central Acts relating to matters

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[47] **1941 FC 47 (63, 34) [AIR V 28] (FC).** (The learned Judge applied the doctrine of occupied field to solve a repugnancy between a Provincial law and an "existing Indian law" with respect to a matter in the Federal List. With great respect, this amounted to an unwarranted extension of the doctrine of occupied field which only applies to conflicts between Federal and Provincial laws i.e., laws passed by the Federal Legislature and those passed by a Provincial Legislature.)

in the Federal List. Such a *carte blanche* could hardly have been contemplated. The scheme of S. 100 of the Act is to exclude completely from the authority of the Provincial Legislature the power to legislate with respect to subjects in List I. If in consequence of certain difficulties that Provincial Legislatures would experience by a rigid enforcement of such an exclusion we must in interpreting the words 'with respect to' import the Canadian doctrine of permissibility of incidental encroachment, we must then at the same time import the other allied doctrine also that such an encroachment is permissible only when the field is actually unoccupied. It is only in this way that actual clash between the Centre and Provinces can be avoided, which I think we must."

But if it be held that neither cl. (1) of this article nor the doctrine of occupied field will apply in such cases, it must be noted that the result will be *not* that there will be *no* repugnancy as repugnancy is unavoidable whenever there are conflicting provisions of law regarding the same matter although only one of them may deal with it in pith and substance and the other may deal with it only incidentally. The result will only be that such repugnancy will be resolved on the general principle that the later law will operate as impliedly repealing the earlier law which conflicts with it. (See also NOTES 5 and 20.)

Before concluding this part of the subject, it must be noted that the observations of the Privy Council in *Megh Raj* v. *Allah Rakhia*[48] already discussed above, taken by themselves, are *general* in their character and suggest that a Provincial law falling in pith and substance in the Provincial field can never be liable to attack on the ground of repugnancy under S. 107, Government of India Act, 1935, even though the repugnancy may be to a *Federal* law. But taken along with the context, the observations have reference only to the question of repugnancy to an *existing Indian law* with respect to a matter in the Concurrent List. Similarly, though some observations of Rajamannar C. J. in *Narayanaswami Naidu* v. *Inspector of Police*[49] and of Harries C. J. in *Jnan Prosanna* v. *The Province of West Bengal*[50] may be of a general character, the actual questions involved in the cases before them only related to the repugnancy of a Provincial law to an *existing Indian law* with respect to a matter in the Concurrent List. In *Lakhi Narayan* v. *Province of Bihar*,[51] the

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[48] 1947 PC 72 [AIR V 34 C 17] : 74 Ind App 12 : 1947 FCR 77 : ILR (1947) Kar (PC) 151 (PC).

[49] 1949 Mad 307 (314) [AIR V 36 C 146] : ILR (1949) Mad 377 : 50 Cri L Jour 405 (SB).

[50] 1949 Cal 1 (9) [AIR V 36 C 1] : 50 Cri L Jour 1 : ILR (1949) 2 Cal 94 (FB)

[51] 1950 FC 59 (62) [AIR V 37 C 5] : 1949 FCR 693 : ILR 29 Pat 185 : 51 Cri L Jour 921 (FC).

Federal Court observed as follows : "It is settled by the decision of the Judicial Committee in *Meghraj* v. *Allah Rakhia*,[52] that when the Province acts solely within its powers under the Provincial List without relying on any power conferred by the Concurrent List, no question of repugnancy under SEC. 107, Government of India Act, would arise." These observations also have to be limited by their context and only relate to a question of repugnancy between a Provincial law and an "existing Indian law." So, apart from the unsoundness of the proposition that this article is *confined* to repugnancies in the *Concurrent* field, there is no *binding* authority to support the proposition, except as regards repugnancy of State law to 'existing law.[53]

(z6) Repugnancy between State law and existing law with respect to matters outside Concurrent List.

It has already been seen above that the repugnancy of a State law to an existing law will not affect the validity of the State law under cl. (1) unless the existing law is with respect to one of the matters in the *Concurrent List.*[54] Hence, where a State law is repugnant to an existing law dealing with a matter in the *Provincial List*, the State law will prevail.[55] So also, where a State law is repugnant to an 'existing law' dealing with a matter in the *Union List*, the State law will prevail.[56] But in this case, the question will have to be. considered whether the State law falls in pith and substance in the State List, as, if it falls in the Union List, it would be *ultra vires* the State Legislature.[57]

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[52] 1947 PC 72 [AIR V 34 C 17] : 74 Ind App 12 : 1947 FCR 77 : ILR (1947) Kar (PC) 151 (PC).

[53] *See* 1954 Punj 241 (Pr 10) [AIR V 41 C 118] (DB), *Sadhu Singh* v. *The Financial Commissioner.* (This case concerns repugnancy between a State Law with respect to a matter in the State List (East Punj. Requisitioning of Immovable Property (Temporary Powers) Act 48 of 1948 as amended by E. P. Act 11 of 1951) and a Union Law (Administration of Evacuee Property Act, 1950) with respect to a matter in the Concurrent List — Although it is held that there is no repugnancy between the provisions of the two laws as alleged this is not on the ground that there cannot be a repugnancy in such cases nor on that of non-applicability of this Article to such cases — The decision only proceeds on the ground that the provisions were not so inconsistent as to require their being held to be repugnant to each other).

[54] 1939 FC 74 (83) [AIR V 26] (FC), *Shyamakant* v. *Rambhajan.*

[55] 1939 FC 74 (83) [AIR V 26] (FC), *Shyamakant* v. *Rambhajan.*
1946 Cal 48 (49) [AIR V 33 C 14] (DB), *Udaychand* v. *Ajit Kumar.*
1942 Cal 429 (434) [AIR V 29] (DB), *Satish Chandra* v. *Sudhir Krishna.*
1939 Cal 628 (634, 635) [AIR V 23] (DB), *Stewart* v. *Brojendra Kishore.*

[56] 1947 PC 60 (62, 63) (Pr 16) [AIR V 34 C 14] : 74 Ind App 23 : 1947 FCR 28 : ILR (1947) Kar (PC) 161 (PC), *Prafulla Kumar* v. *Bank of Commerce, Khulna.*
1950 Pat 35 (38) (Pr 12) [AIR V 37 C 14] : ILR 28 Pat 782 : 51 Cri L Jour 300 (DB), *Bhutnath Ghosh* v. *Province of Bihar.*
[*See* 1944 Pat 303 (304) [AIR V 31] (FB), *Deo Nandan Prosad* v. *Ram Prasad.* (In so far as the Negotiable Instruments Act (existing Indian Law) is legislation within List I, the provisions of S. 107(1), Government of India Act, are, upon their terms inapplicable.)]

The opinion has sometimes been expressed that although a Provincial law, which falls in pith and substance under the Provincial List and conflicts with an existing Indian law as regards matters in the Federal List which the Provincial law incidentally touches upon, is not directly hit by SEC. 107 (1) of the Government of India Act, 1935, yet, such a law will be affected by the doctrine of *occupied field* and such of its provisions as come into conflict with the provisions of an existing Indian law with regard to matters in the Federal List will give way to the provisions of an existing Indian law.[58] It is submitted with respect that this constitutes an unwarranted extension of the principle of occupied field to a law which only deals with a Federal subject but is not a Federal law, while the doctrine is only applicable to repugnancies between Federal and Provincial laws. The implied authority of the Privy Council in *Prafulla Kumar Mookerjee* v. *Bank of Commerce, Khulna*[59] is also against holding that the repugnancy of a Provincial law, which in pith and substance falls under the Provincial List, to the provisions of an existing Indian law in regard to a matter in the *Federal* List will affect the validity of the Provincial law. Hence, the view that would seek to invalidate the Provincial law in such cases by the application of the doctrine of occupied field is neither correct nor good law.

As repugnancy of a State law to an existing law with respect to matters outside the Concurrent List does not affect the validity of the State law, no question of *curing* the repugnancy by application of the procedure under cl. (2) arises in such a case.[60] (See also NOTE 6.)

(z7) Requirement as to matter falling in Concurrent List whether applies to existing law as a whole or to the particular provision to which the repugnancy relates.

The question has been raised whether the words "with respect to one of the matters enumerated in the Concurrent List" qualify only the words "an existing Indian law" in SEC. 107 (1) of the Government of India Act, and not the words "any provision".[61] If it is held that the qualification is only intended for "existing law" as a whole, it would mean that where an existing Indian law as a whole is *not* with respect to a matter in the Concurrent List but a particular provision thereof is with respect to a matter in the Concurrent List, and a Provincial law conflicts with such provision, the provisions of cl. (1) will not come into play. Conversely, it would mean that where an existing Indian law as a whole falls under the Concurrent List and a particular provision thereof which is of a distinct nature falls outside the Concurrent List, the Provincial law which conflicts with such provision will nevertheless be vitiated under cl. (1), as conflicting with an existing law which as a whole falls in the Concurrent List. Thus, this construction leads to the position that even though the particular provision to which the Provincial law is repugnant falls in the Concurrent List, still the validity of the Provincial law may not be affected in some cases, while in others, even though the particular provision to which the Provincial law is repugnant does not fall in the Concurrent List, the Provincial law may be vitiated. Such a construction is obviously not contemplated by the article. Further, it is contrary to the principles relating to the determination of the question whether a law falls within the legislative powers of a Legislature, discussed in the commentary on Art. 246, according to which, even for the application of the doctrine of pith and substance, provisions of an enactment which *organically* stand outside such an enactment have to be treated as a separate block although they may *formally* form part of it. *Organically distinct* parts of the same enactment have to be treated as separate laws for the purpose of seeing whether they fall in pith and substance under a particular legislative list.[62]

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[57] 1947 PC 60 (65) (Prs 37, 38) [AIR V 34 C 14] : 74 Ind App 23 : 1947 FCR 28 : ILR (1947) Kar (PC) 161 (PC), *Prafulla Kumar* v. *Bank of Commerce, Khulna*.

1941 Pat 99 (102) [AIR V 28] (DB), *Sagarmal* v. *Bhuthu Ram*.
[*See* 1939 FC 74 (83) [AIR V 26] (FC), *Shyamakant* v. *Rambhajan*.
1946 Nag 81 (84) [AIR V 33 C 20] (DB), *Balmukand Jainarayan* v. *Ambadas Damodhar*.]

[58] 1941 FC 47 (62, 63) [AIR V 28] (FC), *Subrahmanyan* v. *Muttuswami*. (Per Sulaiman J.)

1944 Pat 303 (304) [AIR V 31] (FB), *Deo Nandan Prosad* v. *Ram Prasad*.

[59] 1947 PC 60 (62, 63) (Pr 16) [AIR V 34 C 14] : 74 Ind App 23 : 1947 FCR 28 : ILR (1947) Kar (PC) 161 (PC).

[60] *See* 1941 Pat 99 (105) [AIR V 28] (DB), *Sagarmal* v. *Bhuthu Ram*.

[61] *See* 1950 Pat 332 (337) [AIR V 37 C 88] : ILR 29 Pat 410 : 51 Cri L Jour 1251, *Ratan Roy* v. *State of Bihar*. (Per Meredith C. J.: The

Moreover, the article does not seem to make any distinction between a 'provision' and a 'law'. The first part of cl. (1) refers to a repugnancy to a "provision" of an existing law. But the latter part of cl. (1) refers to the existing 'law' 'prevailing' against the repugnant Provincial law. Obviously, what is made to 'prevail' cannot be different from that to which the impugned Provincial law is said to be

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restrictions in Art. 254 are as to particular provisions and not to laws as a whole).

1942 Cal 429 (433) [AIR V 29] (DB), *Satish Chandra* v. *Sudhir Krishna.* (Referring to judgment of Sulaiman J. in AIR 1941 FC 47 (FC).)

[62] *See* 1949 Mad 307 (314) [AIR V 36 C 146] : ILR (1949) Mad 377 : 50 Cri L Jour 405 (SB), *Narayanaswami Naidu* v. *Inspector of Police.* ("Provincial law" does not necessarily mean and refer to the entire statute — Any provision of a Provincial Act or Provincial law will also be a Provincial law.)

repugnant. So also, at the beginning of cl. (1) what is repugnant is a "provision" of a Provincial law, but at the end of the clause, the Provincial 'law' is stated to be rendered void by the repugnancy. Surely what is rendered void by repugnancy cannot be different from what *is* repugnant.

(z8) Existing law relating to procedure.

The words "law with respect to one of the matters enumerated in the Concurrent List" do not refer only to *substantive* law. Hence, the repugnancy of a State law to an existing law with respect to a matter in the Concurrent List will affect the validity of the State law, even though the existing law is not a substantive law but one relating to *procedure*. Conversely, where the existing law is with respect to a matter in the *Provincial List*, the validity of the Provincial law will not be affected by its repugnancy to such a law, even though the provisions of the existing law which fall in the Provincial List relate to *procedure* and not to substantive law.[63] In other words, it cannot be said that the requirement that an 'existing law' should fall under the Concurrent List in order to attract the applicability of cl. (1) holds good only in the case of provisions relating to *substantive* law and not those relating to *procedure.*

(z9) Recapitulation and summing up.

The above discussion is devoted to the question as to what must be the subject-matter of the conflicting provisions, in order to attract the applicability of this article. The question in controversy has a double aspect. In its narrower aspect, the question has been only whether a Provincial law, which in pith and substance falls in the Provincial List but incidentally trenches on a matter in the Concurrent List, can be impugned for repugnancy to an existing law with respect to such matter. This has been the main question and the question directly involved in most of the decisions discussed. But in the context of this question, a broader issue has been raised, namely, whether the scope of this article is *confined* to repugnancies between laws which in pith and substance fall in the Concurrent List. So, this broader aspect of the question has also been discussed.

It has been shown that as far as the narrower aspect is concerned, the law is settled, since the decision of the Privy Council in *Meghraj* v. *Allah Rakhia*,[64] that a Provincial law of the type mentioned above is not liable to be questioned for repugnancy, and that notwithstanding such repugnancy it would prevail over existing law.

The soundness of this position has, however, been canvassed and it has been shown to be not consistent with the grammatical or logical construction of this article and requires reconsideration by the Supreme Court when the question is properly raised before it in a future case.

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[63] **1942 Cal 587 (590) [AIR V 29] (DB), Bir Bikram Kishore v. Tafazzal** ***Hossain.***

[64] **1947 PC 72 [AIR V 34 C 17] : 74 Ind App 12 : 1947 FCR 77 : ILR (1947) Kar (PC) 151 (PC).**

In this connection, the broader implications of the position have been considered and the correctness of the proposition that this article is *confined* to repugnancies in regard to matters covered by the Concurrent List, even in the case of repugnancies between Central and State laws (as suggested in the observations of some of the decisions) has been examined and it has been shown with reasons that the proposition is essentially unsound.

In this connection, it has been pointed out that although repugnancy necessarily means that the two conflicting laws deal with the same matter, it does not mean that both of them must deal with the same matter in *pith and substance*, and that a repugnancy between two laws is quite conceivable although one of them deals with a matter in pith and substance and the other deals with it only incidentally. It has been pointed out that it is the overlooking of this fundamental aspect that has led to the view expressed in some decisions that the question of repugnancy in matters outside the Concurrent List has been exhaustively dealt with by S. 100 of the Government of India Act, 1935, corresponding to ART. 246, and does not form the subject-matter of S. 107 of that Act, corresponding to this article.

The anomaly that would result from the acceptance of the proposition expressed has also been pointed out and it has been shown how the view is inconsistent with the principle of occupied field which is an inseparable concomitant of the doctrine of pith and substance which is an accepted doctrine both under the Constitution Act of 1935 and the present Constitution.

So, as regards the question as to what the nature of the subject-matter of the conflicting provisions must be in order to attract the applicability of this article, the position may be summed up as follows :

As regards cl. (1) (which declares the effect of repugnancy), where the repugnancy of a State law is to a Central law it is immaterial under which legislative list the conflicting laws fall. In every case the Central law will prevail except that when the conflicting provisions fall in the Concurrent List, the State law may be made to prevail, so far as the particular State is concerned, by obtaining the President's assent under cl. (2).

Where the repugnancy of the State law is to an existing law, then the repugnancy will affect the validity of the State law only where *both* the conflicting laws fall in the Concurrent List : *Meghraj* v. *Allah Rakhia.*[65]

In other cases the State law will prevail over the existing law. But even in cases in which the conflicting laws fall in the Concurrent List, the assent of the President under cl. (2) will cure the invalidity of the State law caused by the repugnancy.

As regards the applicability of cl. (2), this clause will come into operation only where both the conflicting provisions fall in pith and substance under the Concurrent List. This rule will apply whether the conflict is between a State law and a Central law or between a State law and an existing law.

13. Principle of pith and substance — Relevancy under article. — See NOTES 5 (Z1), 12 and 15 and ART. 246, NOTE 9.

14. Doctrine of occupied field.—See NOTES 5, 6 and 12 and ART. 246, NOTE 10.

(a) Inconsistency — Impossibility of simultaneous operation of both laws.

15. Repugnancy, meaning of. — The marginal note to the article uses the expression "inconsistency", while the body of the article uses the expression "repugnancy". But the idea conveyed by the two expressions in the context is the same. And when it is said that one law is repugnant to another law, all that is meant is that the two laws are inconsistent with each other.

"Inconsistency" connotes the idea of incompatibility. The essential idea involved in inconsistency is that the two laws, which are said to be inconsistent with each other, cannot both logically exist at the same time.[1] In *Clyde Engineering Co. Ltd.* v. *Cowburn*,[2] Higgins J. observed as follows :

> "When is a law 'inconsistent' with another law? Etymologically I presume that things are inconsistent when they cannot stand together at the same time; and one law is inconsistent with another law when the command or power or other provision in one law

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[65] 1947 PC 72 [AIR V 34 C 17] : 74 Ind App 12 : 1947 FCR 77 : ILR (1947) Kar (PC) 151 (PC).

Article 254 — Note 15

[1] 1956 Trav-Co 19 (23) (Pr 17) [(S) AIR V 43 C 5] : ILR (1955) Trav-Co. 741 (FB), *P. M. Bramadathan Nambooripad* v. *C. D. Board*. (Repugnancy must be founded on the impossibility of co-existence.)
[*See* 1954 SC 752 (758) (Prs 10, 11) [AIR V 41 C 174] : 1955 SCR 799 : 1954 Cri L Jour 1822 (SC), *Zaverbhai* v. *State of Bombay*.
1939 FC 74 (84) [AIR V 26] (FC), *Shyamakant Lal* v. *Rambhajan Singh*.
1953 Pat 14 (22) [AIR V 40 C 6] : ILR 31 Pat 921 (FB), *Mangtulal* v. *Radha Shyam*.]

[2] (1926) 37 CLR 466 (503) : 1926 Argus LR 214 (Aus). (Quotation taken from jugdment of Sulaiman J. in *Shyamakant* v. *Rambhajan*, AIR 1939 FC 74 (84) (FC).)

conflicts directly with the command or power or provision in the other.

> "Where two Legislatures operate over the same territory and come into collision, it is necessary that one should prevail; but the necessity is confined to actual collision, as when one Legislature says 'do' and the other says 'don't'. "[3]

In *Kutner* v. *Phillips*[4] the rule was laid down as follows, as regards repeal by implication, and the passage shows what is meant by inconsistency or repugnancy between two laws :

> "A repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together, in which case the maxim, '*leges posteriores priores contrarias abrogant*' applies. Unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied; or unless there is a necessary inconsistency in the two acts standing together."

So, in *Forbes* v. *Attorney General of Manitoba*[5] Lord Macmillan observed as follows :

> "The doctrine of the occupied field applies only where there is a clash between Dominion legislation and Provincial legislation within an area common to both. Here there is no conflict. Both income-taxes may co-exist, and be enforced without clashing."

The above passage also points to the impossibility of co-existence as the test of inconsistency or repugnancy between two laws.

Where the two provisions can stand together and both can operate without either interfering with the other, they cannot be said to be inconsistent with each other.[6]

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[3] Though this passage postulates the need for a *direct conflict* to constitute repugnancy, this is not the majority view in the case. The majority view is to the effect that *direct conflict* is not necessary to constitute repugnancy. As will be seen below, this is the established view now. But this does not affect the proposition that repugnancy implies *inconsistency* or incompatibility between the two laws.

[4] (1891) 2 QB 267 (271, 272) : 60 LJ QB 505.

[5] (1937) 1 All ER 249 (257) : 106 LJ PC 17.

[6] 1954 Mad 993 (1000) (Prs 25, 26) [AIR V 41 C 343] : ILR (1955) Mad 887 : 1954 Cri L Jour 1521 (DB), *In re A. S. Krishna.* (In this case it was held that the Madras Prohibition Act fell in pith and substance within List II and so it could not be impugned for repugnancy to the Criminal Procedure Code which was an "existing Indian law" with respect to a matter in the *Concurrent List.* At the same time, it was remarked that if the Criminal P. C. had been "exhaustive" and had contained a provision that search warrants could not be issued except under its provisions, there might have been room for the contention that in the face of such express provision, no Provincial Legis-

(b) Involvement of contradictory propositions.

Applying this test, it is clear that two laws which involve, *directly or ultimately, contradictory propositions* are inconsistent as they cannot be both in force at the same time.[7] This idea was expressed by Higgins J. in *Attorney-General for Queensland and Goldsbrough Mortgage Co. Ltd.* v. *Attorney General for Commonwealth*[8] as follows :

> "What does 'repugnant' mean ? I am strongly inclined to think that no Colonial Act can be repugnant to an Act of the Parliament of Great Britain unless it involves, either directly or ultimately, a contradictory proposition—probably contradictory duties or contradictory rights."[9]

(c) Test same as in repeal by implication.

The test to see whether a State law is repugnant to a Central law or an existing law is the same as is applicable to the question whether a later law repeals by implication an earlier law. The test that is applied in this context is the test of inconsistency, that is, whether both the laws can be in force at one and the same time. (See NOTE 20.) So, as pointed out by the Federal Court in *Meghraj* v.

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lature could provide for the issue of search warrants in a manner other than that provided by the Criminal Procedure Code.

It is submitted with respect that the views expressed are self-contradictory. If there *can be no repugnancy* between laws falling under different Legislative Lists and that a Provincial Law falling in pith and substance in the Provincial List *cannot* be repugnant to an "existing law" or a Central law "with respect" to a matter in the Concurrent List, how can this position be affected by the question as to what the actual provisions of such "existing law" or Central law are? The inconsistency reveals the essential unsoundness of the view in *Meghraj* v. *Allah Rakhia,* AIR 1947 PC 72 (PC) and decisions based on it, and also of the view that this Article is confined to repugnancies between laws both of which fall within the Consurrent List.)

(1937) 1 All ER 249 (257) : 106 LJ PC 17, *Forbas* v. *Att. Gen. of Manitoba.*

(1892) 1892 App Cas 298 (302) : 62 LJ QB 50, *Tabernacle Permanent Building Society* v. *John Knight.*

[7] (1915) 20 CLR 148 (167, 168) (Aus), *Att. Gen. for Queensland* v. *Att. Gen. for Commonwealth.*

1953 Pat 14 (22) (Pr 23) [AIR V 40 C 6] : ILR 31 Pat 921 (FB), *Mangtulal* v. *Radha Shyam.*

[8] (1915) 20 CLR 148 (167, 168) (Aus). (Quotation taken from the judgment of Sulaiman J. in *Shyamkant* v. *Rambhajan,* AIR 1939 FC 74 (84) (FC).)

[9] It will be seen below that it is the established view now that direct conflict is not necessary to constitute repugnancy between two laws. Inconsistency may arise from *divergence.* Inconsistency may arise from the mere fact that one law intends to cover the whole field in a subject and another law also purports to deal with the same field. But it is conceived that such inconsistencies will be an *indirect* form of contradiction. The words "directly or ultimately" in the above passage are worth noting.

Allah Rakhia,[10] one of the tests of repugnancy that may be adopted for the purpose of this article or S. 107 of the Government of India Act, 1935, is to ask the question whether, if the paramount law were treated as a later law passed by the same Legislature, the subordinate law would have to be considered as repealed by implication. If there would be no repeal by implication, it would follow that there is no repugnancy between the two laws for the purpose of this article. Although this test looks too much like begging the question (*petitio principii*), yet the suggestion of the test points to the principle that, whether the question is one of repugnancy between a Central law and a Provincial law or of inconsistency between a later law and an earlier law of the same Legislature, the same tests are applicable. This is also clear from the judgment of the Supreme Court in *Zaverbhai* v. *State of Bombay*.[11]

(d) Unless the two laws deal with same subject there can be no repugnancy.

As 'inconsistency' means the incapacity of two laws to exist side by side it necessarily follows that unless they deal with the *same* subject, there can be no question of inconsistency. For, if the two laws deal with *different* subjects, it is clear there will be no difficulty in their existing side by side in spite of any seeming divergence or disagreement in the tenor of their provisions. Hence, the first condition of repugnancy between two laws is that they must deal with the *same* subject; otherwise, there would be no question of repugnancy between them.[12]

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[10] 1942 FC 27 (30) [AIR V 29] (FC).

[11] 1954 SC 752 (758) (Prs 10, 11) [AIR V 41 C 174] : 1955 SCR 799 : 1954 Cri L Jour 1822 (SC). (When the punishment or penalty is altered in degree but not in kind, the later provision would be considered as superseding the earlier one — Maxwell on Interpretation of Statutes, 10th Edn. pp. 187 and 188 — If a later Statute again describes an offence created by a previous one, and imposes a different punishment, or varies the procedure, earlier statute is repealed by later statute — *Smith* v. *Benabo,* (1937) 1 KB 518 — See *Michell* v. *Brown,* (1858) 120 ER 909 per Lord Cambell.)

[12] 1954 SC 752 (757) [AIR V 41 C 174] : 1955 SCR 799 : 1954 Cri L Jour 1822 (SC), *Zaverbhai* v. *State of Bombay.* (Though the judgment proceeds on the language of Art. 254(2), Proviso, it clearly illustrates the necessity for identity of subject matter between two Acts in order to give rise to repugnancy.)

1950 FC 59 (62) (Pr 9) [AIR V 37 C 5] : ILR 29 Pat 185 : 51 Cri L Jour 921 : 1949 FCR 693 (FC), *Lakhi Narayan* v. *Province of Bihar.*

1949 FC 81 (88) (Pr 19) [AIR V 36 C 13] : 1948 FCR 207 (FC), *Ralla Ram* v. *Province of East Punjab.* (Punjab Urban Immovable Property Tax Act (17 of 1940), S. 3 — Property Tax under S. 3 based on annual value is not tax on income — Act is not *ultra vires* Provincial Legislature — Act does not come under Federal List, Entry 54 (Income Tax) but under Entry 42, Prov. List and so not impossible to reconcile the seeming conflict between the two Acts — *Note*: There is *not even incidental* encroachment *on Federal List* — So subjects were absolutely different.)

1955 Hyd 194 (200) (Pr 28) [(S) AIR V 42 C 55] : ILR (1955) Hyd 510 (DB), *Jamnalal Ramlal Kimtee* v. *Kishendas.*

But granted that two laws deal with the same subject, under what circumstances will they be "repugnant" to each other ? And when can two laws be said to deal with the "same subject"?

(e) Direct conflict means repugnancy.

A direct conflict between two laws would be a case of manifest inconsistency or repugnancy between them. Thus, when one law says "do" and another law says "don't" with reference to the same act or abstention, then obviously there is inconsistency or repugnancy between two laws. Because, it is impossible in such a case to obey both the laws at the same time, as obedience to either of the two laws would itself amount to disobedience of the other law.

(f) Absence of direct conflict does not necessarily mean absence of repugnancy.

But there may be repugnancy between two laws even in the absence of such *direct conflict* between them.[13] In other words, even

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1953 J & K 25 (33) [AIR V 40 C 17] : 11 J & K LR 1 (DB), *Magher Singh v. Principal Secy.* J. & K. Govt. (Repugnancy, meaning of —J & K Land Acquisition Act, 1990, S. 6 v. J. and K. Big Landed Estates (Abolition) Act 2007) — There is no repugnancy between the two provisions — The former provides that no property can be *acquired* by State for public purposes without payment of compensation as provided by the Act while the Big Landed Estates (Abolition) Act, 2007, does not deal with *acquisition* of property at all — The Act provides for *extinguishment* of rights of the landlord in the manner set forth.)

1942 Cal 587 (589) [AIR V 29] (DB), *Bir Bikram Kishore* v. *Tajazzal Hossain.* (Diversity and repugnancy are not the same thing. Repugnancy implies a conflict. Two provisions of the law may be dissimilar but nevertheless, there may be no conflict between them. Conflict arises when two diverse elements meet in seeking to occupy the same field. Where they do not meet, there is no conflict.)

1939 Cal 628 (634) [AIR V 26] (DB), *Stewart* v. *Brojendra Kishore.*

(1907) 1907 App Cas 65 (68) : 76 LJ PC 23, *Grand Trunk Railway of Canada* v. *Attorney General of Canada.* (The cases in *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada* (1894) 1894 App Cas 189 and *Tenant* v. *The Union Bank of Canada* (1894) 1894 App Cas 31 establish two propositions: First that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires, if the field is clear;* and secondly that if the *field is not clear,* and in such a domain the two legislations meet, then the Dominion legislation must prevail.)

[13] 1953 Pat 14 (22) [AIR V 40 C 6] : ILR 31 Pat 921 (FB), *Mangtu Lal* v. *Radha Shyam.* (Das J.: Statutes may do more than impose duties; they may, for instance, confer rights; and one statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which might be waived or abandoned without disobeying the statute which conferred it.)

1951 Mad 191 (198) (Pr 13) [AIR V 38 C 19] : 52 Cri L Jour 744 (DB), *C. P. Sarathy* v. *State of Madras.* (S. 5 of Madras Act (12 of 1949) envisages and sets the seal of approval on an award passed by a tribunal without the necessary prerequisite of a dispute existing or apprehended so as to form the basis for a reference — S. 5 is inconsistent with S. 10(1) of the Central Act of 1947.)

1948 Lah 120 (123) [AIR V 35 C 42] : 49 Cri L Jour 305 (DB), ***Ahmad*** *Khan* v. *Emperor.*

if it should be *possible* to obey both the laws, there may be repugnancy between the two laws. Thus, where one law says "go east" and another law says "go west," it is conceivably possible to obey both the laws by going first towards the east and then towards the west. As pointed out by Isaacs J., in *Clyde Engineering Co.* v. *Cowburn*,[14] two statutes imposing respectively 20 and 25 lashes for robbery might, in a sense, be both obeyed by infliction of 45 lashes.

(g) Test of obedience to both laws not conclusive.

In such cases, the two laws can be both obeyed in another sense also, i. e., by inflicting the *lesser* punishment. But the *infliction of the higher* punishment would amount to contravention of one of the laws as, by prescribing a lower punishment, it impliedly *forbids* the imposition of a higher punishment.[15] Thus, if a Central law imposes a punishment of 3 years' imprisonment for an offence and a Provincial law prescribes a punishment of 7 years' imprisonment for the same offence, there would be a conflict between the two laws as what accords with the Provincial law may contravene the Central law.[16]

Thus, in the case of such laws it is *possible* to give effect to one of the laws without infringing the other law. But nevertheless, the laws must be deemed to conflict with each other, because it is only in the case of one of the laws that the above proposition is true and not in regard to the *other*. Thus, in the above example, it is only in the case of the Central law that it can be said that giving effect to it will not result in the infringement of the Provincial law and not *vice versa*. Unless it would be possible to give effect to the

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1942 Cal 587 (589) [AIR V 29], *Bir Bikram Kishore* v. *Tafazzal Hussain.* (Repugnancy will arise where diverse elements meet in seeking to occupy the same field.)

1939 Cal 328 (633) [AIR V 26] (DB), *Stewart* v. *Brojendra Kishore Roy.* (The question of repugnancy or inconsistency has arisen and been considered in several Australian cases with reference to S. 109, Commonwealth of Australia Constitution Act, which provides that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall to the extent of the inconsistency be invalid. A summary of the cases will be found in Wynes' Legislative and Executive Powers in Australia; and in Street on *Ultra vires.* In the earlier cases, e.g., *Federated Saw Mills and Employees* v *Moore*, 8 CLR 465, *Australian Boot Trade Employees* v. *Whybrow*, 10 CLR 266, *Federated Engine Drivers and Co. of Australia* v. *Adelaide Chemical and Fertiliser Co.*, 28 CLR 1, the list of inconsistency adopted was whether it was possible to obey both the competing laws. But the later view was different.)

[14] (1926) 37 CLR 466 : 1926 Argus LR 214 (Aus), *Clyde Engineering Co.* v. *Cowburn.*

[15] See in this connection the observations of Channel J. in *Gentel* v. *Rapps,* (1902) 1 KB 130 (166) quoted further down under sub-heading (Z3) in this same Note.

[16] 1954 SC 752 [AIR V 41 C 174] : 1955 SCR 799 : 1954 Cri L Jour 1822 (SC), *Zaverbhai* v. *State of Bombay.*

Provincial law also without infringement of the Central law, there would be contradiction between the two, and they must be held to be repugnant to each other notwithstanding the *possibility* of obeying both the laws at the same time.

Hence, the test of *possibility* of obedience of both the laws has only a *negative* value. Where such obedience is *impossible* owing to the fact that the obedience of either of the two laws will itself amount to disobedience of the other law, the two laws are obviously repugnant to each other. But the test is not helpful on the *positive* side as, notwithstanding the *possibility* of simultaneously obeying *both* the laws, they may still be inconsistent with each other as explained above.[17] In other words, although a *direct conflict* between two laws will create repugnancy between them, yet it is not *necessary* to create such repugnancy. The absence of *direct conflict*, therefore, does not mean the absence of *repugnancy*.

Thus, in *Stewart* v. *Brojendra Kishore*[18] Narsinga Rau J., observed as follows :

> "It is sometimes said that two laws cannot be said to be properly repugnant unless there is a direct conflict between them, as when one says 'do' and the other 'don't'. There is no true repugnancy, according to this view, if it is possible to obey both the laws. For reasons which we shall set forth presently, we think that this is too narrow a test; there may well be cases of repugnancy where both laws say 'don't' but in different ways. For example, one law may say 'No person shall sell liquor by retail, that is, in quantities of less than five gallons at a time' and another law may say 'No person shall sell liquor by retail, that is, in quantities of less than ten gallons at a time.' Here, it is obviously possible to obey both laws, by obeying the more stringent of the two, namely, the second one; yet it is equally obvious that the two laws are repugnant, for to the extent to which a citizen is compelled to obey one of them, the other, though not actually disobeyed, is nullified."

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[17] *See* 1956 Hyd 10 (12) (Pr 3) [AIR V 43 C 3] : ILR (1955) Hyd 737 (DB), *Mirza Hamid Baig* v. *Aresh Balda*. (In this case, it was observed: The test of repugnancy is that it should not be possible for both the laws to stand together, and their provisions should be incompatible in the sense that obedience to one should necessitate the contravention of the other. The State law, only when it thus impairs or detracts from the operation of the Central law, can be said to be repugnant to the Central law and would be void to that extent — Submitted that for reasons discussed in the Commentary above, the test of both the laws being capable of being obeyed simultaneously is not satisfactory.)

[18] 1939 Cal 628 (632, 333) [AIR V 26].

In *Shyamkant Lal* v. *Ram Bhajan Singh*,[19] Sulaiman J., observed as follows :

> "The opinion of the majority (in *Clyde Engineering Co. Ltd.*, v. *Cowburn*,[20] Knox C. J., and Gavan Duffy J., with the concurrence of Isaacs J.) was that :
>
> > 'Two enactments may be inconsistent although obedience to each of them may be possible without disobeying the other. Statutes may do more than impose duties; they may, for instance, confer rights; and one statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which might be waived or abandoned without disobeying the statute which conferred it ; page 478.'
>
> In this view, it may be humanly possible to obey both, simply by not doing what is declared by either to be unlawful, though permitted by the other, and yet there may be palpable inconsistency. It may be conceded that the test of a possible obedience to both is not absolute."

(h) Divergent provisions relating to same matter are repugnant to each other.

The question then is, in what cases can it be said that in spite of the absence of any *direct conflict* between two enactments they are repugnant to each other? To this question, the following would be a correct answer so far as it goes :

(i) Where the two competing laws enact *divergent* provisions relating to the *same* matter, they would be repugnant to each other.

(ii) Where the paramount law evinces an intention, expressly or impliedly, to cover a subject entirely, and the subordinate law contains any *new* provisions relating to such subject, the subordinate law would be repugnant to the paramount *law*.[21]

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[19] 1939 FC 74 (84) [AIR V 26] (FC).

[20] (1926) 37 CLR 466 : 1926 Argus LR 214 (Aus).

[21] *See* 1953 Trav-Co 19 (23) (Pr 17) [(S) AIR V 43 C 5] : ILR (1955) Trav-Co 741 (FB), *P. M. Bramadathan Nambooripad* v. *C. D. Board.* (The new grounds of disqualification added in S. 66 of the Travancore-Cochin Hindu Religious Institutions Act, 1950, will certainly affect persons convicted by a criminal Court of offences involving moral turpitude and the members of the Legislature, but that does not necessarily mean that the two new grounds of disqualification are anything more than an addition or supplement to the four that already existed in the Cochin Hindu Religious Institutions Act (I of 1081) when the Constitution came into force.)
1953 Pat 14 (21) [AIR V 40 C 6] : ILR 31 Pat 921 (FB), *Mangtu Lal v. Radha Shyam.* (It is the Court's duty to see, if it is possible to compare the two enactments so to speak quantitatively, in order that what is *excessive* or contradictory in the State enactment and nothing more shall be deemed void.)]

(i) Test of paramount law evincing intention to cover whole field.

In a number of decisions, however, the test of repugnancy has been stated to be as follows :

Where the paramount law evinces an intention, expressly or impliedly, to cover a subject, a subordinate law seeking to deal with the same subject would be repugnant to the paramount law.[22]

Thus, in *Stewart* v. *Brojendra Kishore*,[23] Narsinga Rau J. (with whom Mitter J. concurred) after reviewing the case law of Australia, Canada and Great Britain, observed as follows :

> "The principle deducible from the English cases, as from the Canadian cases, seems therefore to be the same as that enunciated by Isaacs J. in the Australian 44-hour case (*Clyde Engineering Co.* v. *Cowburn*[24]): if dominant law has expressly or impliedly evinced its intention to cover the whole field, then a subordinate law in the same field is repugnant and therefore inoperative. Whether and to what extent in a given case, the dominant law evinces such an

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[22] 1939 Cal 628 (634) [AIR V 26] (DB), *Stewart* v. *Brojendra Kishore Roy.*

1952 Hyd 187 (190) (Pr 12) [AIR V 39] : ILR (1952) Hyd 384 : 1952 Cri L Jour 1740 (FB), *Pannalal Lahoti* v. *Hyderabad State.* (Where the State Law is superseded by the exercise of the legislative power of Parliament, the sphere of legislative power of the State so far as that subject is concerned, becomes void. Where, therefore, the Central Legislature evinces its intention to cover the field exclusively, it becomes an "occupied field" and all State Laws in respect of that matter are rendered invalid. *Clyde Engineering Co.* v. *Cowburn* 37 Com LR 466, and AIR 1939 Cal 628, Rel. on. The intention of the Code of Criminal Procedure (Amendment) Act is to govern completely the particular matter viz., all matters relating to Criminal Procedure and therefore the provisions in the Hyderabad Code governing the same subject would be regarded as repugnant.

Therefore a criminal case pending at the time the Code of Criminal Procedure (Amendment) Act came into force in the Hyderabad.State would be governed by the Indian Criminal Procedure Code and not by the Hyderabad Criminal Procedure Code.)

1952 Trav-Co 371 (374) [AIR V 39], *Ayyaswami Nadar* v. *Joseph.*

1951 Trav-Co 203 (207) [AIR V 38 C 81] : ILR (1951) Trav-Co 458, *Nagalinga Nadar Sons* v. *Ambalapuzah Taluk Head Load Conveyance Workers' Union.*

1948 Lah 120 (123) (Pr 8) [AIR V 35 C 42] : 49 Cri L Jour 305 (DB), *Ahmad Khan* v. *Emperor.*

(1942-43) 63 CLR 567 (573, 574), *Carter* v. *Egg and Egg Pulp Marketing Board.* (Taken from AIR 1951 Trav-Co. 203 (207).)

(1937) 58 CLR 618 (630), *Victoria* v. *The Commonwealth.* (Taken from AIR 1951 Trav-Co. 203 (207).)

(1930) 43 CLR 472, *Ex parte McLean* : *Re Firth.* (Taken from AIR 1939 Cal 328.)

(1926) 37 CLR 466 (490) : 1926 Argus LR 214 (Aus), *Clyde Engineering Co.* v. *Cowburn.*

[23] 1939 Cal 628 (634) [AIR V 26] (DB).

[24] (1926) 37 CLR 466 : 1926 Argus LR 214 (Aus).

intention must necessarily depend on the language of the particular law."

In *Clyde Engineering Co.* v. *Cowburn*,[25] Isaacs J. observed as follows :

> "If . . . . a competent Legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another Legislature assumes to enter to any extent upon the same field."

Another case which may be cited is *Ex parte Mclean; Re Firth*,[26] in which Dixon J. observed that inconsistency "depends on the intention of the paramount Legislature to express by its enactment completely, exhaustively or exclusively what shall be the law governing the particular conduct or matter to which its intention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter."

The same learned Judge observed as follows in *Victoria* v. *The Commonwealth*[27] :

> "I attempted in *Ex parte Mclean* : *Re Firth*[28] to explain my conception of the principle upon which the decisions had proceeded, particularly those given upon the Commonwealth Conciliation and Arbitration Act, and there will be found all that is required for the purpose now in hand. Substantially, it amounts to this. When a a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid. Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so, as inconsistent."

Another Australian case, which may be referred to, is *Carter* v. *Egg and Egg Pulp Marketing Board*[29] in which Latham C. J. observed as follows :

> "Federal and State laws, each—within the powers of the respective enacting Legislatures —- may be inconsistent in terms in the sense that there is a direct conflict between them so that it is impossible to give effect to both laws. A clear example of such inconsistency is to be found in *R.* v. *Brisbane Licensing Court; Ex*

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[25] (1926) 37 CLR 466 (490) : 1926 Argus LR 214 (Aus).
[26] (1930) 43 CLR 472.
[27] (1937) 58 CLR 618 (630).
[28] (1930) 43 CLR 472 (483).
[29] (1942-43) 66 CLR 567 (573-574).

parte Daniel.[30] A State statute provided that a State vote on Liquor Licensing should be taken on the same day as that fixed for a poll at an election for the senate of the Commonwealth. A Commonwealth statute provided that no vote of electors of a State should be taken under the law of a State on any day appointed for an election of the senate. There was a direct conflict between the two statutes and the State law was therefore inoperative.

But, when there is no inconsistency in the actual terms of the competing statutes, the Commonwealth Parliament may have shown an intention to make its legislation upon a particular subject exhaustive, so as to exclude any State legislation upon that subject. In such a case any State law upon the subject will be inoperative by reason of S. 109. (*Clyde Engineering Co. Ltd.* v. *Cowburn,*[31] *Huma* v. *Palmar*[32] where State legislation was held to be invalid under S. 109; *Stock Motor Ploughs Ltd.* v. *Porsyth*[33] where State legislation was held to be valid, there being no intention of the Commonwealth Parliament to exclude State laws upon certain subjects.)

The exercise of a power conferred by a Federal statute may result in State legislation becoming inoperative. Thus, if a State law is inconsistent with an award of the Commonwealth Conciliation and Arbitration Court either because there is a direct conflict or because the award is intended to be a complete and exhaustive code in relation to particular matters, the State law is inoperative *pro tanto* : the State Legislation must give way : *Engineers' case,*[34] *Clyde Engineering Co. Ltd.* v. *Cowburn,*[35] *H. V. Mckay Pty Ltd.,* v. *Hunt,*[36] *Ex parte Mclean.*[37]"

In *Ahmad Khan* v. *Emperor,*[38] Bhandari J. of the Lahore High Court observed as follows :

"The expression 'repugnant' has not been defined in the statute. But it has come up for consideration in a large number of cases in Canada and Australia. These cases were reviewed with care by Narsinga Rau J. in *Stewart* v. *Brojendra Kishore.*[39] He came to the conclusion that it is too narrow a test to say that two laws cannot be said to be properly repugnant unless there is a direct conflict between them, as when one says 'do' and the other 'don't'. There may well be cases of repugnancy where both laws say 'dont', but in different ways. The true test is that if the dominant law has expressly or impliedly evinced its intention to cover the whole field, then a subordinate law in the same field is repugnant and, therefore, inoperative. Whether and to what extent in a given case, the dominant law evinces such an intention must necessarily depend on the language of the particular law."

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[30] (1920) 28 CLR 23.
[31] (1925) 37 CLR 466 : 1926 Argus LR 214 (Aus).
[32] (1926) 38 CLR 441.
[33] (1932) 48 CLR 128.
[34] (1920) 28 CLR 129 (154).
[35] (1926) 37 CLR 466 : 1926 Argus LR 214 (Aus).
[36] (1926) 38 CLR 308.
[37] (1930) 43 CLR 472.
[38] 1948 Lah 120 (123) [AIR V 35 C 42] : 49 Cri L Jour 305 (DB).
[39] 1939 Cal 628 [AIR V 26] (DB).

Reference may also be made to the decisions of the Privy Council bearing on the Canadian Constitution, in which also it has been recognized that divergent provisions relating to an identical matter would be repugnant to each other. Thus, in the *Grand Trunk Railway Co.* v. *Attorney-General of Canada*[40] it was laid down:

> "A comparison of two cases decided in the year 1894—viz., *Attorney-General of Ontario* v. *Attorney-General of Canada*[41] and *Tenant* v. *Union Bank of Canada*[42]—seems to establish these two propositions: First, that there can be a domain in which Provincial and Dominion legislation may overlap in which case neither legislation will be *ultra vires*, if the field is clear ; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail."

It will be seen that the passages quoted above, in laying down the test of repugnancy, do not *expressly* refer to *divergence* of provisions as an essential element of repugnancy, but proceed as if the fact that a Central law evinces an intention, expressly or impliedly, to cover a particular subject entirely is itself *ipso facto* sufficient to make the Provincial law dealing with the same subject repugnant to the Central law irrespective of the nature of the provisions in the Provincial law.

(j) Laws containing same provisions relating to same subject may be repugnant to each other.

This raises the question whether a Provincial law with respect to a certain subject which contains *exactly the same provisions* as a Central law with respect to the same subject will be void for repugnancy on the ground that the Central law intends to be a complete and comprehensive Code on that subject and to deal with it exhaustively. Thus, suppose, for instance, a Provincial Legislature passes a law on a certain subject in the Concurrent List and afterwards the Central Legislature passes a law which repeats, word for word, the provisions of the Provincial law on the same subject. The Central law evinces the intention to cover the entire field. Will the Provincial law be void for repugnancy to the Central law ? Are not the provisions of the Provincial law merely *redundant* and not *repugnant* to the Central law ? The position is that even in such cases, the Provincial law would be *repugnant* to the Central law. This appears from two decisions of the High Court of Travancore-Cochin which are discussed below.

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[40] (1907) 1907 App Cas 65 (68) : 76 LJ PC 23.

[41] (1894) 1894 App Cas 189 : 63 LJ PC 59.

[42] (1894) 1894 App Cas 31 : 63 LJ PC 25.

(k) Authorities regarding above examined.

(k) Authorities regarding above examined.

In *Nagalinga Nadar Sons* v. *Ambalapuzah Taluk Head Load Conveyance Workers Union*,[43] the question was whether the Travancore-Cochin Industrial Disputes Act, 16 of 1950, was repugnant to Industrial Disputes Act (Central), 1947, as amended by Act 8 of 1950. The concerned provision in the Travancore-Cochin Act was identical in terms with the corresponding section in the Central Act. In fact, the provisions of the two Acts were identical except in regard to one particular question which was immaterial to the discussion. Koshi J. held that there was repugnancy between the two Acts and that the Central Act would eclipse the Travancore-Cochin Act completely, that is, even in respect of provisions which were identical. This view of Koshi J. was followed by Sankaran J. in a later case of the same High Court in *Aiyyasamy Nadar* v. *Joseph*.[44] Koshi-J. in *Nagalinga Nadar's case*[45] relied upon *Stewart* v. *Brojendra Kishore*[46] and other authorities referred to above. But it is not clear how far the above decisions specifically contemplated cases in which the two laws in question contained exactly the same provisions relating to a matter.

Thus, in *Stewart* v. *Brojendra Kishore*[47] the question was not about provisions which were exactly similar to each other or in identical terms. The question which was being considered by Narsinga Rau J. in his judgment was whether a direct conflict between two laws was necessary in order to create repugnancy between them or whether even in the absence of such direct conflict, there could be repugnancy where the provisions in the two laws were different. The context in the discussion may be understood from the following passage which occurs at the very beginning of the discussion:

> "It is sometimes said that two laws cannot be said to be properly repugnant unless there is a direct conflict between them, as when one says 'do' and the other 'don't'. There is no true repugnancy according to this view if it is possible to obey both the laws. For reasons which we shall set forth presently, we think

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[43] 1951 Trav-Co 203 (207) (Pr 15) [AIR V 38 C 81] : ILR (1951) Trav-Co. 458.

[44] 1952 Trav-Co 371 (373, 374) (Pr 6) [AIR V 39].

[45] 1951 Trav-Co 203 (207) (Pr 15) [AIR V 38 C 81] : ILR (1951) Trav-Co 458, *Nagalinga Nadar Sons* v. *Ambalapuzah Taluk Head Load Conveyance Workers' Union*.

[46] 1939 Cal 628 [AIR V 26] (DB).

[47] 1939 Cal 628 (632, 633) [AIR V 23] (DB).

that this is too narrow a test: there may well be cases of repugnancy where both laws say 'don't' but *in different ways*." (Italics ours).

What follows is only an elaboration of this thesis, so that the discussion seems to be concerned with a question as to whether and under what circumstances laws containing *divergent* provisions about a matter will be repugnant to each other.

Similar is the background of discussion in *Ahmad Khan* v. *Emperor*[48] in which Bhandari J. follows *Stewart* v. *Brojendra Kishore*.[49] Even in the Australian case, *Clyde Engineering Co.* v. *Cowburn*,[50] from which a passage has been quoted above, the provisions in the two laws were divergent and not identical.

Hence, it seems arguable that the above decisions must only be taken to lay down that where a Central law evinces an intention, expressly or impliedly, to constitute a complete and comprehensive code on the subject with which it deals, a Provincial law which contains any *additional or divergent* provisions relating to the same subject would be repugnant to the Central law, although such provisions may not *directly conflict* with those of the Central law.

But the actual words used in the several passages quoted above unambiguously lay down the test as being only whether the paramount law evinces an intention to cover the entire field and this, it is submitted, is the correct view.

(l) Position explained.

The repugnancy of the Provincial law in such cases consists in the violation of the intention of the Central law to occupy the field *entirely*. The actual provisions of the Provincial law do not matter.

(m) Anomalous results that would follow if position were otherwise.

If the position were not so, it would lead to anomalous results. Thus, in the above Travancore Cochin cases, there was a reference of an industrial dispute for adjudication to an Industrial Court under the Industrial Disputes Act, 1947. The contention was that the reference ought to have been made under the State Act, and that the reference under the Central Act was invalid. The contention was rejected on the ground that as the Central Act evinced the intention to occupy the field wholly, the State Act on the same subject was bad for repugnancy.

Suppose the State Act was held not to be bad for repugnancy. The result would be that both the Central and State Acts would apply. This would mean that there could be two references of the same dispute to different tribunals with the possible consequence of there being two contradictory awards of two tribunals about the same dispute.[51]

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[48] 1948 Lah 120 (123) [AIR V 35 C 42] : 49 Cri L Jour 305 (DB).
[49] 1939 Cal 628 (632, 633) [AIR V 26] (DB).
[50] (1926) 37 CLR 466 (490) : 1926 Argus LR 214 (Aus).

Thus, even laws containing the same provisions may lead to contradictory results if they are allowed to operate simultaneously.

(n) Concept of both laws existing side by side: Fact that result would be same whether one or other applied is not enough.

In such cases, it cannot be said that there is *no* repugnancy because, whichever law is given effect to, the result would be the same. Because this assumes that only *one* of the laws is to be given effect to at a time while the test of non-repugnancy is that it must be possible to give effect to *both* the laws at the same time without producing any contradictory results. Where both the laws cannot be given effect to in this way, that means that they cannot exist side by side and so are inconsistent with each other, i. e., *repugnant* to each other. Thus, it must be clearly grasped that the test of both laws existing side by side or being capable of being given effect to at the same time—which is the test of absence of repugnancy between them —is *not* that it makes no difference *which* of them is given effect to. The test is that even if *both* are given effect to, there must be no contradiction in the results. Otherwise, they would be repugnant to each other.

Thus, apart from the fact that when one law evinces an intention to cover a whole field, an attempt on the part of another law to deal with the same subject (irrespective of the actual provisions) would be contrary to the *intent* of the former law, thus giving rise to repugnancy between the two laws, the duplicate operation of even identical provisions may lead to contradictory *results*.

(o) "One matter, one law."

So, perhaps, the principle may be expressed to be "one matter, one law". Where neither of the laws intends to cover the whole field each of them dealing with certain distinct aspects of it, then there is obviously room for both and there is no question of repugnancy. But in such cases, it is clear that the *exact matter* dealt with by either of the laws is not identical with that dealt with by the other, and it is only in a *general* sense that the subject dealt with by the laws is same. That is why Narsinga Rau J. said in *Stewart* v. *Brojendra Kishore*[52] that there is only one test of repugnancy—"the single test of the 'occupied field'."

(p) Supreme Court decision as to above.

The above-mentioned principle of identity of subject-matter as the test of repugnancy between the two laws was also applied by the

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[51] No doubt, the award is not directly enforceable but has to be confirmed by the Government so that the difficulty of contradictory awards can be got over, under the provisions of the law as they now stand, by the Government accepting one of the awards and rejecting the other. But this does not obviate the possible contradiction between the awards which result from the simultaneous operation of both laws supposed not to be repugnant.

[52] 1939 Cal 628 (634) [AIR V 26] (DB).

Supreme Court in *Zaverbhai* v. *State of Bombay.*[53] In that case, the question was whether S. 2 of Bombay Act, 36 of 1947, was repugnant to S. 7 of the Central Act, the Essential Supplies (Temporary Powers) Act, 1946, as substituted by Act, 52 of 1950. The Central Act provided for punishment up to 3 years for offences under the Essential Supplies (Temporary Powers) Act generally, while providing for an enhanced punishment up to 7 years for a particular type of offences. The Bombay Act provided uniformly for punishment up to 7 years for all cases of offences under the Essential Supplies (Temporary Powers) Act. It was held by the Supreme Court that the provision in the Bombay Act was void for repugnancy to the Central Act. The Supreme Court pointed out that S. 7 of the Central Act "was a comprehensive Code covering the entire field of punishment for offences under the Act, graded according to the commodities and to the character of the offence. The subject of enhanced punishment dealt with by the Bombay Act was also comprised in the Central Act No. 52 of 1950, the same being limited to the case of "hoarding of foodgrains." The Supreme Court, therefore, held that the Central Act and the Bombay Act both related to the same matter and the Bombay Act which enacted different provision from that in the Central Act in relation to such matter was therefore bad for repugnancy.

The Supreme Court also pointed out that the subject-matter of legislation could not be split up in two, viz., punishment simpliciter and enhanced punishment, as Bavdekar J. in the lower Court had attempted to do. The Supreme Court also expressly endorsed the view that to establish repugnancy between a Central law and a Provincial law "it was not necessary that one legislation should say 'do' what the other legislation says 'don't' and that repugnancy might result when both the legislations covered the same field".

It will be seen that in the above case there was no question of one legislation saying "do" and another legislation saying "don't" about the same thing. Both the legislations only said "don't", but they said it in *different ways*, the Bombay legislation prescribing a punishment of 7 years' imprisonment for the doing of the thing, while the Central legislation prescribed the punishment of only 3 years except in regard to one type of offence in which the maximum penalty of 7 years' imprisonment was laid down.[54] Still as both the laws dealt with the same subject but enacted different provisions relating thereto and the Central law evinced an intention to cover the whole field exclusively, the Provincial law was to that extent bad for repugnancy.

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[53] 1954 SC 752 (757, 758) (Pr 8, 10, 11) [AIR V 41 C 174] : 1955 SCR 799 : 1954 Cri L Jour 1822 (SC).

[54] It is, however, possible to view the matter as being that the Central Law *impliedly prohibited* the infliction of a higher punishment than imprisonment of 3 years while the Bombay Law permitted such infliction so that one law said "you may" what the other law said "you shall not". In this view, there would be clearly repugnancy between the two laws — See in this connection the observations of Channel J.

It must be noted that in the above case, though the Supreme Court pointed out the difference between the provisions of the Central law and those of the Provincial law, it is clear from their Lordships' judgment that they regarded the sameness of the subject as the determining factor.

It may also be mentioned that their Lordships were applying the Proviso to cl. (2) of the article and were considering whether the Central law, which was the later law, was "with respect to the same matter" within the meaning of that Proviso. But it is obvious that their Lordships were only considering the question of *repugnancy* between the two laws and it is only in connection with that question they were construing and applying the Proviso to cl. (2).[55]

(q) Objections as to test of 'occupied field': Interference with powers of State Legislature.

But it may be objected whether the above view (as to intent of one law to occupy the whole field) does not amount to holding that the Central Legislature can virtually *debar* the Provincial Legislature from functioning at all in regard to a subject on which it has, under the Constitution, power to legislate, for it means that the Central Legislature by enacting a law with intent to cover the whole field in regard to a subject in the Concurrent List can effectively prevent the Provincial Legislature from enacting an *operative* law on the same subject.

As regards this objection, it must be pointed out that there is no question of the Central Legislature debarring the Provincial Legislature from legislating on a particular subject when the Central Legislature passes a law intended to be a *complete code* on the subject. The effect of such a Central law is only to make the Provincial law on the same subject *repugnant*, which is quite a different matter from the *incompetency* of the law. As will be seen in NOTE 17, repugnancy does not make a law *ultra vires*. It has only the effect of causing an *eclipse* of the law, so to say, to the extent and so long as the inconsistent paramount law continues on the statute book.

Moreover, in so far as there may be supposed to be an interference with the legislative powers of a Provincial Legislature in such cases, such interference is one which is based on the Constitution itself and there is nothing unconstitutional in it.

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in *Gentel v. Rapps*, (1902) 1 KB 160 (166) quoted further down in this Note.

[55] For a criticism of their Lordships' judgment for having wrongly applied this Article to the case before them, see Note 2.

(r) Inconsistency in actual provisions not necessary: Observations of Federal Court in *Lakhi Narayan* v. *Province of Bihar*, explained.

In this connection, however, the following observations of the Federal Court in *Lakhi Narayan* v. *Province of Bihar*[56] must be referred to :

> "The Concurrent List is not a forbidden field to the Provincial Legislature and the mere fact that the Provincial Legislature has legislated on any matter in the Concurrent List is not enough to attract the mischief of S. 107, Government of India Act, 1935. There must be repugnancy between such legislation and an existing law and then and then only would the existing law prevail unless the procedure laid down in sub-s. (2) of S. 107 was followed."

The above observations only emphasise the need for *repugnancy* to attract the provisions of S. 107 of the Government of India Act, 1935 (corresponding to this article). The observations do not throw any light on the question as to what will *constitute* repugnancy, and hence cannot be taken as militating against the view that when one law evinces an intention to cover the whole field another law purporting to deal with the same matter would be repugnant to it. The observations cannot be regarded as laying down that repugnancy in *actual* provisions is necessary and that the notion of the Provincial law being repugnant merely because there is already a Central law on the *same* matter is not correct. Repugnancy may arise because of inconsistency in actual provisions or because one of the laws intends to deal with the matter entirely and exclusively. In fact, the test of the paramount law being exhaustive with respect to a topic is referred to by the Federal Court itself in the same passage, for the Federal Court proceeded to observe as follows :

> "In our opinion, there is no repugnancy between the provisions of the impugned Ordinance and those of the Criminal Procedure Code. Section 54, Criminal P. C., does not purport to be exhaustive or unqualified and various provisions for arrest without warrant are to be found in other Acts, e. g., Police Act, Arms Act, Explosive Acts, Indian Railways Act, etc., and S. 1 (2), Criminal P. C., expressly lays down that the provisions of the Code would not affect any special form of procedure prescribed by any law for the time being in force. The provision of S. 21 of the Ordinance cannot be said therefore to be repugnant to S. 54, Criminal P. C. Similarly, the investing of certain Magistrates with powers to try offences under the Ordinance does not affect or touch in the least any provision of the Criminal Procedure Code."

(s) Some dissenting views examined.

There are, however, expressions of views in some decisions which have refused to accept the correctness of the test of "occupied field" as set forth above.

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[56] 1950 FC 59 (64) (Pr 16) [AIR V 37 C 5] : 51 Cri L Jour 921 : 1949 FCR 693 : ILR 29 Pat 185 (FC).

(t) *Mangtu Lal* v. *Radha Shyam.*

Thus, in *Mangtu Lal* v. *Radha Shyam*,[57] Ramaswami, J., of the Patna High Court observed as follows :

> "It is necessary to state at the outset that the doctrine of 'occupied field' cannot be invoked to test the validity of a State law under ART. 254 of the Constitution. In an Australian case, Isaacs, J. expressed the doctrine in the following terms : 'If, however, a competent Legislature expressly or impliedly evinces its intention of covering the whole field, that is a conclusive test of inconsistency where another Legislature assumes to enter to any extent upon the same field : *Clyde Engineering Co. Ltd.* v. *Cowburn.*[58] But in the framework of the Indian Constitution the Concurrent List is not a forbidden field to the State Legislature and the mere fact that the State Legislature has legislated on a matter in the Concurrent List is not enough to attract the mischief of ART. 254. There must be actual repugnancy between such legislation and existing law as required by ART. 254 (1) and then and then only would the existing law prevail to the extent of the repugnancy and not otherwise. There is a further reason why the doctrine of 'occupied field' cannot be applied as a proper constitutional test. Modern legislation covers matters of infinite complexity and variety which often overlap and intersect. There can be no analogy between such legislation and a picture of a two dimensional field. The test of 'covering the field' is, therefore, an ambiguous test, and is deceptive and of little assistance. What then is the correct test of repugnancy between two competing statutes ? In *Victoria* v. *The Commonwealth*,[59] Dixon J. states :
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> > 'Substantially it amounts to this. When a State law, if valid, would alter, impair or detract from the operation of the law of the Commonwealth Parliament, then to that extent it is invalid. Moreover, if it appears from the terms, nature or the subject-matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights or duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so is inconsistent.' "

As regards the above passage, it is submitted with respect that it is self-contradictory. The first part of the passage undoubtedly refuses to accept the test of "occupied field" laid down by Isaacs J. in *Clyde Engineering Co. Ltd.* v. *Cowburn.*[60] But in the latter part of the passage, the learned Judge has evidently expressed his concurrence with the view of Dixon J. as expressed in *Victoria* v. *The Commonwealth.*[61]

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[57] 1953 Pat 14 (20) (Pr 18) [AIR V 40 C 6] : ILR 31 Pat 921 (FB).
[58] (1926) 37 CLR 466 (489) : 1926 Argus LR 214 (Aus).
[59] (1937) 58 Com LR 618.
[60] (1926) 37 CLR 466 (490) : 1926 Argus LR 214 (Aus).

The view of Dixon J. in the latter case seems to be exactly the same as the view of Isaacs J. in the former case. It is not clear what distinction was made between the two views by the learned Judge. In *Stewart* v. *Brojendra Kishore*[62] as well as in *Nagalinga Nadar Sons* v. *Ambalapuzah Taluk Head Load Conveyance Workers Union,*[63] already discussed, the views of Dixon J. and Isaacs J. are taken to be concurrent and not as conflicting. It is difficult to see how Ramaswami J. came to the conclusion that the views conflicted with each other.

In any case, as he has approved of the view of Dixon J. in *Victoria* v. *The Commonwealth,*[64] he cannot really be taken to have expressed his dessent from the theory of 'occupied field' as affording the correct test of repugnancy between two laws.

(u) *State* v. *Zaverbhai.*

In *State* v. *Zaverbhai,*[65] Chagla C. J. also expressed his disapproval of the test of "occupied field" above discussed. In the argument before him, Counsel referred to the view of Isaacs J. in *Clyde Engineering Co.* v. *Cowburn*[66] quoted above and pointing out that the Patna High Court in *Mangtulal* v. *Radha Shyam*[67] had dissented from that view, contended that the view was not applicable to India. Counsel also submitted that the true test was, as laid down in *Kutner* v. *Phillips*[68] (which had been referred to by Sulaiman J. in his judgment in *Shyamkant Lal* v. *Rambhajan Singh*[69]), whether the two laws could stand together. Chagla C. J. agreed with this contention and observed as follows :

> "In my opinion it is correct that as far as our Constitution is concerned, the doctrine of occupied field cannot be applied, if that doctrine means that if Parliament legislates on a particular subject and thereby occupies the field, the State Legislature is completely debarred from legislating on the same subject. The very fact that a particular subject is in the Concurrent List means that both Parliament and the State Legislature are entitled to legislate with regard to that subject. Therefore, Parliament cannot exclude or oust the State Legislature merely by legislating on any particular

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[61] (1937) 58 CLR 618.
[62] 1939 Cal 628 (333) [AIR V 26] (DB).
[63] 1951 Trav-Co 203 (207) [AIR V 38 C 81] : ILR (1951) Trav-Co 458.
[64] (1937) 58 Com LR 618.
[65] 1953 Bom 371 (382) [AIR V 40 C 118] : ILR (1954) Bom 117 : 1953 Cri L Jour 1594.
[66] (1926) 37 Com LR 466 : 1926 Argus LR 214 (Aus).
[67] 1953 Pat 14 [AIR V 40 C 6] : ILR 31 Pat 921 (FB).
[68] (1891) 2 QB 267 (271) : 60 LJ QB 505.
[69] 1939 FC 74 (84) [AIR V 26] (FC).

subject. Our Constitution clearly recognises the right of both Parliament and the State Legislature to legislate concurrently with regard to a subject mentioned in the Concurrent List, and therefore the doctrine of repugnancy we must apply here is not so stringent as would be applied in other countries where the constitutional position is different. In my opinion the repugnancy that has got to be found is the repugnancy in the actual provisions of the two laws and not with regard to the subject-matter of the two laws. Therefore the proper test is what was suggested by Sulaiman J. viz., whether effect can be given to the provisions of both the laws or whether both the laws can stand together. If effect cannot be given to both the laws and both the laws cannot stand together, then the law made by Parliament must prevail as against the law made by the State Legislature."

With very great respect, it is submitted that the above observations seem to proceed on a misunderstanding of the principle of "occupied field" suggested as a test of repugnancy in *Clyde Engineering Co.* v. *Cowburn*[70] and other cases.

(v) No question of interference with power of Provincial Legislature.

As already pointed out, there is no question of the State Legislature being "completely debarred from legislating on the same subject," as mentioned by Chagla C. J. The question of *repugnancy* is distinct from that of *competency* of the legislation, and a Provincial law which is bad for repugnancy is not *ultra vires*.

Nor is it the idea, when it is stated that in the presence of a Central law evincing the intention to cover the whole field, a Provincial law dealing with the same subject would be bad for repugnancy to the Central law, that the intention of the Central law is that the Provincial Legislature must not *legislate* on the subject at all. In fact, the Central Legislature is not concerned with what the Provincial Legislature should do. Repugnancy is an incident laid down by the *Constitution* and is not a creation of the *Legislature*. Therefore, there is no question of the Parliament "excluding or ousting the State Legislature merely by legislating on any particular subject."

But there is nothing to prevent the Central Legislature from enacting a law which has the intent of providing a complete code on a subject without there being any scope for any other law relating thereto. In enacting such a law, the Central Legislature will be exercising only its legitimate *legislative* powers under the Constitution. If the presence of such a law makes a Provincial law dealing with the same subject bad for repugnancy, that is a matter provided for by the Constitution itself and is not the result of any intention of the

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[70] (1926) 37 CLR 466 : 1926 Argus LR 214 (Aus).

Central *Legislature* to exclude the Provincial Legislature from its legitimate powers and functions under the Constitution.

Such interference as may be supposed to exist in such cases, with the legislative powers of the Provincial Legislature, is, (besides not being really such an interference at all), a matter having the full sanction of the Constitution itself and as such impeccable from a constituional point of view.

(w) Decisions on Australian Constitution not irrelevant.

Both Ramaswami J. in *Mangtulal* v. *Radha Shyam*[71] and Chagla C. J. in *State* v. *Zaverbhai*[72] seem to have unnecessarily tried to draw a distinction between the Australian Constitution and the Indian Constitution in regard to this matter.

In the first place, they seem to have overlooked the fact that although under the Australian Constitution there are not three *Legislative Lists* as under the Indian Constitution, yet under S. 51 of the Australian Constitution subjects are enumerated in regard to which the Centre has concurrent legislative power with the States. Further, S. 109 of the Australian Constitution corresponds to this article and provides that : "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." Hence, so far as the constitutional provisions are concerned, there seems to be no material difference between the Australian Constitution and the Indian Constitution, so as to affect the question as to what will constitute repugnancy between a State law and a Central law.

In fact, it seems that what will constitute repugnancy between two laws is not so much a question of *constitutional law* at all as one of interpretation of statutes. It is only the *effect* of repugnancy for which the Constitution provides. The Constitution nowhere *defines* repugnancy. That is why, in the discussions on the meaning of repugnancy, cases not bearing on constitutional law are also referred to, see, for instance, the judgment of Narsinga Rau J. in *Stewart* v. *Brojendra Kishore*.[73] So, in *Zaverbhai* v. *State of Bombay*,[74] decisions and authorities relating to interpretation of statutes and bearing on the question as to what will constitute implied repeal of an earlier law by a later law have been referred to by the Supreme Court. As already pointed out earlier in this Note, the test of repugnancy is the same whether the question is one of implied repeal of an earlier law by a later law or one of repugnancy between a Central law and a

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[71] 1953 Pat 14 (20) (Pr 18) [AIR V 40 C 3] : ILR 31 Pat 921 (FB).

[72] 1953 Bom 371 (382) (Pr 34) [AIR V 40 C 118] : ILR (1954) Bom 117 : 1953 Cri L Jour 1602 (DB).

[73] 1939 Cal 628 (633, 634) [AIR V 26] (DB).

[74] 1954 SC 752 (758) (Pr 10) [AIR V 41 C 174] : 1955 SCR 799 : 1954 Cri L Jour 1822 (SC).

Provincial law. This has been pointed out by Varadachariar J. in *Meghraj* v. *Allah Rakhia*.[75]

In fact *Kutner* v. *Phillips*,[76] which Chagla C. J. himself has referred to in his judgment and approved as laying down a correct test of repugnancy, is a case *not of constitutional law*, but one relating to the question of implied repeal. Hence, it is submitted that the ground on which the Australian decisions are sought to be distinguished by the learned Judges is not sound.

(x) Other reasons against dissenting view

It has already been pointed out how the observations of Ramaswami J. in *Mangtu Lal* v. *Radha Shyam*,[77] are self-contradictory and in so far as Chagla C. J. may have been influenced by those observations the weight to be attached to his view also will be affected. Moreover, the Supreme Court itself has, in *Zaverbhai* v. *State of Bombay*,[78] applied the test of sameness of subject. This case was an appeal from the one in which Chagla C. J. was delivering his judgment. In this case, although Chagla C. J.'s decision was confirmed by the Supreme Court, his *reasoning* was not adopted.

The anomalies that would follow from not accepting the test of sameness of subject and occupied field as discussed above have also been pointed out above.

(y) Test as to both laws standing together not derogatory to theory of occupied field.

In this connection, it may be pointed out that even according to Chagla C. J., the proper test is whether effect can be given to the provisions of *both* the laws or whether both the laws can stand together. Where one of the laws evinces the intention to cover the whole field, it is not clear how *effect can be given* to both the laws or how both the laws can stand together.

It must also be remembered that even if both the laws contain the *same* provisions, effect will have to be given to *both*. This will mean *duplication* in the operation of the laws, leading to anomalous results in some cases.

As pointed out already, if, for example, *both* the Central Industrial Disputes Act and a State Industrial Disputes Act are held to be operative, there can be *two* references of the same industrial dispute to two different tribunals with the possibility of such tribunals passing contradictory awards relating to the same matter.

Therefore, even according to the test suggested by Chagla C. J. as being the proper test, where one law evinces the intention to constitute the complete code on a matter, to allow another law to operate in the same field is capable of leading to anomalous and contradictory results, and, therefore, necessarily and demonstrably to repugnancies between the two laws.

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[75] 1942 FC 27 (30) [AIR V 29] (FC).

[76] (1891) 2 QB 267 (271) : 60 LJ QB 505.

[77] 1953 Pat 14 (20) (Pr 18) [AIR V 40 C 6] : ILR 31 Pat 921 (FB).

[78] 1954 SC 752 (757) (Pr 8) [AIR V 41 C 174] : 1955 SCR 799 : 1954 Cri L Jour 1822 (SC).

(z) What is meant by both laws standing together.

In this connection, what is meant by *both* the laws standing together or effect being given to both the laws must be clearly understood. As already explained, if the position is only that the result is the same whether one of the laws is given effect to or the other, it cannot be said that this proves that *both* the laws can stand together or given effect to at the same time. This only means that *one of the laws* can operate at one time and not that *both* can operate. Hence, the exact similarity of provisions between two laws does not mean that there can be no repugnancy between them. There will be no repugnancy between them only if their simultaneous operation will not lead to contradictory or inconsistent results.

(z1) Conclusion: 'occupied field' a sound test.

Thus, in the illustration as to the Industrial Disputes Act mentioned above, if there is only one reference, it will make no difference in the result whether the reference is made under the State law *or* the Central law. But in such a case, it would not be a case of *both* the laws being given effect to. Therefore, the fact that the result would be the same whether the reference was made under the State law *or* the Central law, would not prove that *both* of them can be given effect to at the same time and that there is no repugnancy between them. That can only be proved by showing that even if there were two references, of the same dispute, to two tribunals under the two Acts, there would *necessarily* be the same award—which would obviously not be the case.

Thus, even according to the test of the possibility of both laws being given effect to simultaneously, suggested by Chagla C. J., himself, the principle of sameness of subject with the intention, on the part of the dominant law, to occupy the same field wholly, seems to be the determining factor as to what will constitute repugnancy between two laws.

And as already stated, this test seems to have also received the approval of the Supreme Court in *Zaverbhai* v. *State of Bombay*.[79]

(z2) Where the matter is not same, no repugnancy.

From the above it will be seen that the controversy is only as to under what circumstances two laws dealing with a subject can be said to be repugnant to each other. Where admittedly the two laws deal with *different* subjects, there is no scope for any repugnancy, and there is no dispute about this proposition.

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[79] 1954 SC 752 (757) (Pr 8) [AIR V 41 C 174] : 1955 SCR 799 : 1954 Cri L Jour 1822 (SC).

(z3) Paramount law not exhaustive: No repugnancy.

Where the paramount law is not intended to be exhaustive and to cover the entire field exclusively, a subordinate law relating to the same subject will not be repugnant to the paramount law unless there is inconsistency between the *actual* provisions of the two laws.[80]

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[80] (1902) 1 KB 160 (163) : 71 LJ KB 105, *Gentel* v. *Rapps.* (A bye-law is repugnant if it adds something *inconsistent* with the provisions of a statute creating the same offence; but if it adds something *not inconsistent,* that is not sufficient to make the bye-law bad as repugnant.)

1950 FC 59 (64, 65) (Pr 16) [AIR V 37 C 5] : 1949 FCR 693: ILR 29 Pat 185 : 51 Cri L Jour 921 (FC), *Lakhi Narayan* v. *Province of Bihar.* (It cannot be contended that S. 21, Bihar Maintenance of Public Order Ordinance, 1949 is void under S. 107, G. I. Act, 1935, because it empowers any police officer to arrest without warrant any person suspected of having committed an offence punishable under the Ordinance which really amounts to legislation on Criminal Procedure and conflicts with S. 54, Cr. P. C. Section 54, Cr. P. C. does not purport to be exhaustive or unqualified and various provisions for arrest without warrant are found in other Acts also. Hence S. 21 of the Ordinance cannot be said to be repugnant to S. 54, Cr. P. C. and as there is no repugnancy S. 107 can have no application.)

1942 FC 27 (30) [AIR V 29] (FC), *Megh Raj* v. *Allah Rakhia.*

1956 Trav-Co 19 (23) (Pr 17) [(S) AIR V 43 C 5] : ILR (1955) Trav-Co 741 (FB), *P. M. Pramadathan Nambooripad* v. *C. D. Board.* (New grounds of disqualification added in later statute by way of *supplement* to the grounds already mentioned in earlier enactment — No repugnancy — Trav-Cochin Hindu Religious Institutions Act, 1950, S. 66, is not repugnant to Cochin Hindu Religious Institutions Act, 1 of 1081.)

1955 Mys 65 (67) (Pr 6) [(S) AIR V 42 C 24] : ILR (1955) Mys 43 (FB), *H. R. Patel* v. *Venkatalakshamma.* (Mysore Chief Court Act (1 of 1884), S. 15 (3) is not inconsistent with C. P. C., S. 98(2) as the Mysore Act only supplements the provisions of the C. P. C.)

1954 Mad 993 (997, 998) (Pr 17) [AIR V 41 C 343] : 1954 Cri L Jour 1521 : ILR (1955) Mad 887 (DB), *In re A. S. Kishna.* (S. 4(2), Madras Prohibition Act, is not repugnant to Evidence Act. What facts should be established affirmatively before the Court can be called upon to hold that an accused is guilty of any offence will depend upon the nature of the particular offence. In some cases, the establishment of one fact necessarily leads to the inference of other facts. There is no reason why a statute should not prescribe the ingredients which have to be established by the prosecution before the prosecution can obtain a verdict of guilty of the offence with which an accused is charged. Such a provision would not conflict with the general rules of burden of proof laid down in the Evidence Act. The presumption laid down in S. 4(2) of the Prohibition Act is not repugnant to the Evidence Act, because it adds a presumption to the presumptions contained in the Evidence Act. Criminal P. C. is not exhaustive as to search warrants.)

1954 Raj 252 (255, 256) (Prs 11, 12, 13) [AIR V 41 C 79] : ILR (1954) 4 Raj 958 (DB), *Milapchand* v. *Dwarka Das.* (Rajasthan Premises (Control of Rent and Eviction) Act (XVII of 1950) — Sections 6 and 8 are

Thus, in *Gentel* v. *Rapps*,[81] Channel J. observed as follows:

> "A bye-law is not repugnant to the general law merely because it creates a new offence, and says that something shall be unlawful which the law does not say is unlawful. It is repugnant if it makes unlawful that which the general law says is lawful. It is repugnant if it expressly or by necessary implication professes to alter the general law of the land. I say 'by necessary implication' because I have in mind the cases with respect to bye-laws prohibiting persons from travelling on railways without a ticket. In those cases bye-laws which impose the same penalty as the general law without making a fraudulent intention part of the description of the offence have been held to be bad, because the statute creating

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merely supplementary to the Transfer of Property Act, and are not repugnant to Ss. 105 and 108(1) of that Act. Section 108(1), T. P. Act, only applies to those cases where there is no contract or local usage to the contrary. It lays down the liability of the lessee to pay at the proper time and place the rent to the lessor or his agent. The emphasis in cl. (1) is on payment or tender at the proper time or place. Clause (1) has nothing to do with the fixation of rent, and therefore the provisions of the impugned Act, which give power to the Courts to scale down the agreed rent, cannot be said to be repugnant to cl. (1), but they are only supplementary to it. It is true that the rent, as defined in S. 105, means the amount which is to be paid by the lessee to the lessor according to the agreement between the parties. But this agreement is not sacrosanct as is clear from S. 37, Contract Act. S. 37, Contract Act, must be read as supplementary to the provisions of the Transfer of Property Act, and where a law is made dispensing with or excusing the performance of any agreement, the parties can take advantage of that law which also will be supplementary to the Transfer of Property Act.)

1950 Pat 332 (337, 338, 339) (Prs 11, 22, 23) [AIR V 37 C 88] : ILR 29 Pat 410 : 51 Cri L Jour 1251, *Ratan Roy* v. *State of Bihar*. (Repugnancy can arise only when one law says 'shall' and the other says 'shall not'. It does not arise when one law says 'may in certain circumstances' and the other says 'may also in certain other circumstances'. The provisions in the Bihar Preventive Detention Ordinance with regard to arrest and detention are not to be regarded as repugnant to those in the Criminal Procedure Code, but as supplemental to those, and hence the Ordinance cannot be held to be void under Art. 254 of the Constitution of India. The Criminal Procedure Code is not exhaustive of preventive detention and hence no question of repugnancy arises. Nor can it be held that the State Legislature, and consequently the Governor, has no power to create offences.)

1939 Cal 628 (634, 635) [AIR V 26] (DB), *Stewart* v. *Brojendra Kishore*. (Section 10C, Assam Court of Wards Amendment Act (1937), is not repugnant to S. 51 or O. 21, R. 24 or any other provision of the C. P. C. because these provisions of C. P. C. are not intended to be *exhaustive or to lay down* the whole of the law on the subject with which they deal.)

[81] (902) 1 KB 160 (166) : 71 LJ KB 105.

the offence says that there must be a fraudulent intention on the part of the person charged with travelling without a ticket, and the bye-law, therefore, by implication alters the general law. Again, a bye-law is repugnant if it adds something inconsistent with the provisions of a statute creating the same offence; but if it adds something not inconsistent, that is not sufficient to make the bye-law bad as repugnant."

With reference to the above passage, Narsinga Rau J., observes as follows in *Stewart* v. *Brojendra Kishore*:[82]

> "All these propositions are really reducible to the single test of the 'occupied field,' for in the first and the last illustrations, the ground not being covered by the general law, there is no repugnancy and in the others, the ground is already covered, so that the bye-law is repugnant."

(z4) Paramount law itself providing for exceptions—Laws coming within exceptions not repugnant.

Where the paramount law itself provides for exceptions and the subordinate law is covered by such an exception, then obviously there is no inconsistency between the two laws, although their provisions may, *otherwise*, differ from each other or even contradict each other.[83] Thus, referring to the difficulty felt in precisely defining

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[82] 1939 Cal 623 (634) [AIR V 26] (DB).

[83] 1942 FC 27 (30, 31) [AIR V 29] (FC), *Megh Raj* v. *Allah Rakhia*. (A number of instances are given in this case to illustrate this proposition. *Note* : The authority of this judgment on the *meaning* of repugnancy is not affected by the judgment of the Privy Council on appeal in the same case in AIR 1947 PC 72 (PC). The question on which the Privy Council seems to have taken a different view was different. That was whether a Provincial law which, in pith and substance, fell within the Provincial List would be bad for repugnancy under S. 107 of the Govt. of India Act, 1935, to an 'existing Indian law' with respect to a matter in the Concurrent List. The Privy Council expressed the view that the Provincial law would *not* be affected in such a case. But the Federal Court seemed to have taken a different *view* and held that the question of pith and substance was not relevant under S. 107, G. I. Act. But at the same time, the Federal Court held that in the particular case there was no repugnancy as the paramount law itself made exceptions which applied to the impugned Provincial law in this case.)

1945 FC 1 (2) [AIR V 32] : ILR (1945) Kar (FC) 1 : ILR (1945) 2 Cal 295 (FC), *Mukunda Murari* v. *Pabitramoy Ghosh*. (Bengal Non-Agricultural Tenancy (Temporary Provisions) Act, 9 of 1940, S. 3 — Even if the Act falls within Entry 4 List III, G. I. Act as being in respect of Civil Procedure there is no repugnancy between O. 21, R. 24 and S. 3 of the Act, as C. P. C. must be read subject to S. 4(1) thereof, which saves special power conferred by or under any other law for the time being in force. AIR 1942 FC 27 (FC), Rel. on.)

1941 FC 16 (26, 29) [AIR V 28] (FC), *United Provinces* v. *Atiqa Begum*. (Contention that the U. P. Regularisation Act 14 of 1938 which bars a civil remedy conflicts with S. 9, Civil P. C. is not sound as S. 9 is subject to exceptions which apply to the case — S. 4, C. P. C. also contains a saving clause.)

1955 Mys 65 (Prs 6, 28, 29, 31) [(S) AIR V 42 C 24] : ILR (1955) Mys 43 (FB), *H. R. Patel* v. *Venkatalakshamma.* (Constitution of India, Arts. 225, 254 (1) — Mysore Chief Court Act (1 of 1884), S. 15(3) not repugnant to S. 98(2), Civil P. C.—Provisions in Mysore Act are supplementary to those in the C. P. C.—Moreover, S. 4(1), C. P. C. expressly excepts special and local laws.)

1953 Pat 14 (21) (Pr 19) [AIR V 40 C 6] : ILR 31 Pat 921 (FB), *Mangtulal* v. *Radha Shyam.* (On this principle there is no repugnancy or conflict between Section 9, Civil P. C. and Section 11, Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, for Section 4, Civil P. C. enacts that in the absence of any specific provision to the contrary, nothing in the Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred or any special form of procedure prescribed, by or under any other law for the time being in force. Hence an Act which bars a civil remedy in certain cases cannot be said to be repugnant to Civil P. C.: AIR 1941 FC 16 (FC), Rel. on.—On the same principle S. 11 cannot be said to be repugnant to S. 37, Contract Act, as the statement of the general law in S. 37 is qualified by the words "unless such performance is dispensed with or excused under the provisions of any other law.")

1944 Pat 54 (56, 57, 58) [AIR V 31] (FB), *Ram Ran Vijay Prashad* v. *Kishun Singh.* (Under S. 107(1), G. I. Act, S. 163-A of Bihar Tenancy Act 8 of 1885 is not void. No question of repugnancy of S. 163A to the proviso to O. 21, R. 66(2), Civil P. C. added by the Patna High Court can arise. The effect of S. 4(1), Civil P. C. is that there being no specific provision to the contrary, nothing in the Code will affect the provision of S. 163A.)

1955 Pat 1 (Pr 19) [(S) AIR V 42 C 1] : ILR 33 Pat 690 (SB), *Brij Bhukan* v. *S. D. O. Siwan.* (Bihar Land Encroachment Act, 1950, not repugnant to C. P. C., or Cr. P. C.)

1947 Cal 1 (6, 7, 10) (Prs 21, 24, 34) [AIR V 34 C 1] : ILR (1947) 1 Cal 537 (SB), *Mati Lal Shah* v. *Chandra Kanta.* (Sections 20 and 34, Bengal Agricultural Debtors Act (7 of 1936) as amended by Act 8 of 1940 are not void on the ground of their being repugnant to S. 47, Civil P. C. as by S. 4, Civil P. C. the Code excepts itself, whenever there is some special or local or other law to the opposite effect, so that there can be no repugnancy. However between S. 20, Bengal Agricultural Debtors Act as amended and S. 34 of the same Act as substituted by Act 8 of 1940 and S. 31 of the Presidency Small Cause Courts Act there is a repugnancy and the two sections of the Bengal Act are to the extent of such repugnancy void for the reason that assent of the Governor-General to the amending Act was not obtained. The two sections, so far as they bear on execution of decrees of the Presidency Small Cause Court by a Civil Court, are invalid.)

1956 Hyd 10 (12) (Pr 3) [AIR V 43 C 3] : ILR (1955) Hyd 737 (DB), *Hamid Baig v. Aresh Balda.* (Rule 21, City Improvement Board Regulations (Hyderabad), empowers the Superintending Engineer to get a tenant evicted without seeking eviction from the Rent Controller or the Civil Court. This cannot be said to be repugnant to S. 106, T. P. Act because that section expressly confines its application to cases where there is no 'contract or local law or usage to the contrary'. It cannot be said to be inconsistent either with S. 9, C. P. Code because in that section also suits cognizance of which is either expressly or impliedly barred are exempted.)

1955 NUC (Mys) 5377 [AIR V 42] (DB), *Hanumanthiah* v. *Puttama.* (Civil P. C., S. 4 expressly saves the validity of special laws of procedure — So also S. 9, C. P. C. is expressly made subject to provisions barring suit.)

1954 All 630 (661) (Pr 9) [AIR V 41 C 261] (DB), *Raghubir* v. *Govt. of U. P.* (U. P. Act XXX of 1953 does not amend C. P. Code and did not require sanction of President for its validity.)

1954 Mad 993 (Prs 25, 26) [AIR V 41 C 343] : ILR (1955) Mad 887 : 1954 Cri L Jour 1521 (DB), *A. S. Krishna In re.* (Madras Prohibition Act not repugnant to Criminal P. C.)

1954 Raj 252 (Pr 14) [AIR V 41 C 79] : ILR (1954) 4 Raj 958, *Milap Chand* v. *Dwarka Das.* (Rajasthan Premises (Control of Rent and Eviction) Act 17 of 1950 — S. 22, which forbids second appeal, is not repugnant to S. 100, C. P. C., as S. 100 itself provides for exceptions.)

1953 Trav-Co 327 (334) (Pr 27) [AIR V 40 C 122] : ILR (1952) Trav-Co 670 (DB), *Vishnu* v. *Poulo.* (S. 4, C. P. C. provides for exceptions to Civil Procedure Code.)

1946 Cal 48 (49) [AIR V 33 C 14] (DB), *Udaychand* v. *Ajit Kumar.* (Alleged repugnancy between S. 168A, B. T. Act 8 of 1885 and C. P. C., S. 51 is avoided by S. 4, C. P. C. — S. 168A says that in execution of decree for rent *no other* property of judgment-debtor than the tenure in arrears can be sold, which is inconsistent with C. P. C., S. 51 — Repugnancy avoided because of C. P. C., S. 4.—It was argued that there was no conferring of special power or creation of special jurisdiction within S. 4, C. P. C. but only taking away of certain powers—Contention overruled—Pointed out that taking away of powers may itself amount to creation of special jurisdiction or conferment of special power: AIR 1945 FC 1 (FC), Rel. on.)

1942 Cal 587 (589) [AIR V 29] (DB), *Bir Bikram Kishore* v. *Tafazzal Hossain.* (No conflict between S. 168A, Bengal Tenancy Act (1885) as amended by Bengal Act 18 of 1940 and S. 51, C. P. C. — B. T. Act provides its own special procedure.—Section 168A is merely an item in that special procedure — So, C. P. C., S. 51 and S. 168A, B. T. Act do not meet and so there is no conflict — S. 4, C. P. C. further supports this view.)

1942 Cal 429 (434) [AIR V 29] (DB), *Satish Chandra* v. *Sudhir Krishna.* (Section 168A (1), Bengal Tenancy Act not repugnant to Ss. 51 and 30, C. P. C.)

1939 Cal 628 (632, 633) [AIR V 26] (DB), *Stewart v. Brojendra Kishore.* (Section 10C, Assam Court of Wards Act, 1937, is not repugnant to C. P. C., S. 51 and O. 21 R. 24 as they were not intended to be *exhaustive* the test of repugnancy or inconsistency, the Federal Court observed as follows in *Meghraj* v. *Allah Rakhia*[84]:

> "There, however, appears to be no serious difficulty in the class of cases (referred to by Wynes on p. 102) of which *Stock Motor Ploughs* v. *Forsyth*[85] is an illustration. The principle of that decision is that where the paramount legislation does not purport to be exhaustive or unqualified, but itself permits or recognises other laws restricting or qualifying the general provision made in it, it cannot be said that any qualification or restriction introduced by another law is repugnant to the provision in the main or paramount law."

Various instances may be given in illustration of the above principle. A very prominent instance is S. 4 of the Code of Civil Procedure which lays down that in the absence of any specific provision to the contrary, nothing in the Code shall be deemed to limit or otherwise affect any special form of procedure prescribed by or under any other law for the time being in force. Similarly, S. 9 of the Civil Procedure Code, which postulates the jurisdiction of the ordinary civil courts to try all suits of a civil nature, excepts "suits of which cognizance is either expressly or impliedly barred". These qualifying or saving words preclude the contention that an Act, which bars a civil remedy in certain cases, is repugnant to the provisions of the Civil Procedure Code.[86]

Another instance is contained in S. 37 of the Contract Act which lays down that parties to a contract must either perform or offer to perform their respective promises, but qualifies the statement by the words "unless such performance is dispensed with or excused under the provisions of any other law."

Where the paramount law provides for exceptions to itself, it must necessarily mean that the paramount law does not purport to cover the entire field and hence, a subordinate law which comes within the exceptions and the paramount law would not be dealing with the

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and to lay down the *whole* law on the subject with which they deal – S. 4, C. P. C. leaves no doubt on the point.)

[*See however* 1954 Vindh Pra 24 (31) (Pr 37) [AIR V 41 C 9], *Mordhwaj Singh* v. *Vindhya Pradesh State.* (State law barring jurisdiction of Civil Court is repugnant to S. 9, Civil P. C. — *Note* : The decision is not correct as S. 9, C. P. C. itself excepts suits of which cognizance is barred expressly or impliedly.)]

[84] 1942 FC 27 (30) [AIR V 29] (FC).

[85] (1932) 48 CLR 128.

[86] 1942 FC 27 (30) [AIR V 29] (FC), *Meghraj* v. *Allah Rakhia.*
1941 FC 16 (26, 29) [AIR V 28] (FC), *United Provinces* v. *Atiqa Begum.*

same subject so as to be repugnant to each other.[87] Where a law does not come within the exception provided, it will be repugnant.[88]

(z5) Summing up.

The above discussion may be summed up as follows:

(i) Repugnancy means *inconsistency* between two laws.

(ii) Inconsistency involves the idea that the two laws cannot *both* be simultaneously operative.

(iii) "Inconsistency" necessarily involves the notion that the competing laws deal with the same subject.

(iv) The absence of inconsistency or repugnancy means that *both* laws are capable of being given effect to at the same time without producing any contradictory results.

(v) The fact that two laws have *similar* provisions so that it will make no difference whether one or the other law is given effect to will not prove the absence of repugnancy. It cannot be said that in such cases, when one of the laws is being applied, *both* the laws are being given effect to.

(vi) Where there is a direct conflict between the two laws as when one of them says "do" something which the other says "don't", there is clearly repugnancy between the two laws.

(vii) But the absence of direct conflict does not necessarily mean the absence of repugnance.

(viii) Even in the absence of *direct conflict*, repugnancy will arise where the two competing laws enact *divergent* provisions relating to the same subject.

(ix) Where the paramount law expressly or impliedly evinces an intention to cover the whole field exhaustively and exclusively and the subordinate law enacts *additional* provisions relating to such subject, there would be repugnancy between the two.[89]

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[87] 1942 Cal 587 (589) [AIR V 29] (DB), *Bir Bikram Kishore* v. *Tafazzal Hossain*. (Diversity and repugnancy are not the same thing. Repugnancy implies a conflict. Two provisions of the law may be diverse or dissimilar but nevertheless there may be no conflict between them. Conflict arises when two diverse elements meet in seeking to occupy the same field. Where they do not meet there is no conflict. There is no conflict between S. 168A, Bengal Tenancy Act (1885) as amended by Bengal Act 18 of 1940 and S. 51, Civil P. C. because these two diverse provisions occupy two different fields. B. T. Act provides its own special procedure. Section 168A is merely an item in that special procedure — So S. 51, C. P. C. and S. 168A, B. T. Act do not meet and so no conflict — C. P. C., S. 4 referred to as supporting the view taken.)

1939 Cal 628 (634) [AIR V 26] (DB), *Stewart* v. *Brojendra Kishore*.

[88] 1955 Pat 1 (30) (Pr 20) [(S) AIR V 42 C 1] : ILR 33 Pat 690 (SB), *Brij Bhukan* v. *S. D. O. Siwan*. (Bihar Land Encroachment Act, 1950 is repugnant to Limitation Act though not to C. P. C. and Cr. P. C.)

[89] *See* 1953 Pat 14 (21) [AIR V 40 C 6] : ILR 31 Pat 921 (FB), *Mangtulal* v. *Radha Shyam*. (Court should compare the laws alleged to be repug-

(x) Where the paramount law is not exhaustive, i. e., does not evince the intention of covering the subject entirely and exclusively, a subordinate law dealing with the same subject will not be repugnant unless there is inconsistency between the *actual* provisions.

(xi) Where the paramount law itself contains an exception or qualification, a subordinate law, which comes within such exception or qualification, will not be repugnant although it may be otherwise contrary to or divergent from the paramount law.

(xii) Even where the paramount law and the subordinate law contain exactly similar provisions regarding a matter, the subordinate law will be repugnant to the paramount law where the paramount law evinces the intention to cover the entire field.

(z6) Illustrative cases.

As to illustrative cases see the undermentioned decisions.[90]

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nant to each other and only declare what is excessive or contradictory to be repugnant.)

[90] *Note* : The foot-note remarks in other foot-notes under this Note also may be seen for "illustrations" of the application of the principles discussed.

In the following cases it was held that there was repugnancy :

1954 SC 752 (757) (Pr 9) [AIR V 41 C 174] : 1955 SCR 799 : 1954 Cri L Jour 1822 (SC), *Zaverbhai* v. *State of Bombay.* (Essential Supplies (Temporary Powers) Act (1946) as amended by Act 52 of 1950 and Bombay Act 36 of 1947 amending former Act — Central law prescribing maximum sentence of 3 years' imprisonment and Provincial law prescribing maximum of seven years for offences under the Act — Bombay Act is repugnant.)

1951 Hyd 140 (153) (Pr 74) [AIR V 38 C 57] : ILR (1951) Hyd 689 (FB), *Ramdayal* v. *Sankarlal.* (Per M. A. Ansari J. : Section 3 of the Hyderabad Legal Practitioners Act is not good law on the ground that it is an unreasonable restriction on the fundamental right of a citizen to practise his profession and also because it is void being inconsistent with Order 3 Rule (1) of the Civil Procedure Code which authorises a pleader including an Advocate on the roll of any High Court to appear subject to the rule-making powers of the High Court).

1947 Cal 1 (6, 7, 10) [AIR V 34 C 1] : ILR (1947) 1 Cal 537 (SB), *Mati Lal Shah* v. *Chandra Kanta.* (Between Section 20, Bengal Agricultural Debtors Act as amended and Section 34 of the same Act as substituted by Act 8 of 1940 and Section 31 of the Presidency Small Cause Courts Act, there is a repugnancy and the two sections of the Bengal Act are to the extent of such repugnancy, void for the reasons that assent of the G. G. to the amending Act was not obtained. The two sections so far as they bar an execution of decrees of the Presidency Small Cause Court by a Civil Court are invalid. But Ss. 20 and 34 of the Act held not void for repugnancy to S. 47, C. P. C. as by S. 4, C. P. C., the Code excepts itself whenever there is some special or local or other law to the opposite effect.)

1954 Mad 833 (Prs 20, 21, 25, 28, 29) [AIR V 41 C 281] : ILR (1955) Mad 184 : 1954 Cri L Jour 1267 (DB), *In re Guruviah Naidu and Co.* (Section 16A, Madras General Sales Tax Act, 1939 is *ultra vires* the Constitution and repugnant to Civil P. C. and Evidence Act, as it hits against the rights of the accused under the Criminal Procedure Code, the Evidence Act and against the fundamental principle of criminal justice. It is also repugnant to Art. 14 of the Constitution : Dissented from in AIR 1955 Trav-Co 220 (223). *Note*: Under S. 16A of Madras General Sales Tax Act, the validity of assessment cannot be questioned in a prosecution under the Act. S. 21 of the Trav-Cochin Sales Tax Act was similar.)

1951 Mad 191 (198) (Pr 13) [AIR V 38 C 19] : 52 Cri L Jour 744 (DB), *C. P. Sarthy* v. *State of Madras*. (Section 5, Industrial Disputes (Madras Amendment) Act (XII (12) of 1949), envisages and sets the seal of approval on, an award passed by a tribunal without the necessary prerequisite of a dispute either existing or apprehended so as to form the basis for a reference. Section 5 is inconsistent with S. 10(1), Industrial Disputes Act, 1947, which postulates the existence or apprehension of an industrial dispute which can be referred to a tribunal for adjudication.)

1939 Cal 628 (633) [AIR V 26] (DB), *Stewart* v. *Brojendra Kishore*. (One law may say "No person shall sell liquor by retail, that is, in quantities of less than 5 gallons at a time", and another law may say "No person shall sell liquor by retail, that is, in quantities of less than 10 gallons at a time". Here it is obviously possible to obey both laws by obeying the more stringent of the two, namely, the second one, yet it is equally obvious that the two laws are repugnant, for, to the extent to which a citizen is compelled to obey one of them, the other, though not actually disobeyed, is nullified — *Note* : In such a case, the matter may also be viewed as being that one law impliedly *permits* sale of liquor in quantities of less than 10 gallons at a time while the other law *prohibits* such sale, so that one law says "you may" what the other law says "you shall not". In this sense also there is inconsistency between the laws and so repugnancy.)

1939 Lah 498 (498) [AIR V 26], *Lala Hans Raj* v. *Seth Ram Lal*. (*Provincial Law* : Suit on pronote to be brought where *defendant* resides — Central law allowing suit to be brought where the money is agreed to be paid — Provincial law void to that extent — In Delhi, Courts are governed by S. 20(c), Civil P. C. and the U. P. Agriculturists Relief Act, 1934, was void to the extent of the repugnancy.)

1939 Pat 90 (93, 94) [AIR V 26] (DB), *Vishwanath* v. *Harihar Gir*. (Sections 13 and 17 of Bihar Money-lenders Act, 1938 are repugnant to C. P. C., O. 21, R. 36, Proviso — Under O. 21, R. 66, Proviso Courts are asked not to mention any estimate of value in the sale proclamation except those, if any, given by the parties and not to vouch for the correctness of any of them. Sections 16 and 17 of the Act order the Courts to fix the value carefully, make their orders appealable to higher tribunals and by necessary implication compel them to put the value in the sale proclamation and to sell the property only if the price fetched is according to the value fixed by them, unless of course, some other considerations arise — It is impossible for the Courts to carry out both the orders. They will have to disregard one or the other — *Note*: The above view however is not correct as the Civil P. C. is not "exhaustive" and makes provision for exceptions.)

(1926) 37 CLR 465 : 1926 Argus LR 214, *Clyde Engineering Co.* v. *Cowburn*. (Conflict between an award of the Conciliation Court providing for a working week of 48 hours and a New South Wales Act providing for payment of overtime for any work in excess of 44 hours, — *Held* test of whether it was possible to obey both the compelling laws was too narrow and so, in this case, there was repugnancy.)

(1896) 1 QB 290 (293) : 65 LJ MC 55, *Strickland* v. *Hayes*. (A bye-law which provided, that no person shall use profane language in any street was held to be bad because the general law, namely, the Town Police Clauses Act, 1847, dealing with precisely the same subject, required that *annoyance* should be caused by the language used in order that there might be an offence.)

(1896) 1896 App Cas 348 (369, 370) : 65 LJ PC 26, *Attorney General for Ontario* v. *Attorney General for the Dominion*. (Canada Temperance Act, 1886, (a Dominion Act) contained one set of prohibitions about retail sales of liquor, while the Ontario Act, 53 Vict. C. 56 (a Provincial Act) contained another and a rather different set. The Dominion Act had not been made imperative throughout the Dominion. The Privy Council held that where the prohibitions of the Dominion Act were or might be in actual operation the Provincial Act was or would be inoperative by reason of repugnancy, but where the former were not in actual operation (by reason of their not having been locally adopted) there could be no repugnancy.)

In the following cases it was held that there was no repugnancy:

1953 SC 83 (86) [AIR V 40 C 23] : 1953 SCR 319 : ILR (1953) Punj 639 : 1953 Cri L Jour 525 (SC), *Darshan Singh* v. *State of Punjab*. (In this case, the validity of a provision in the East Punjab Cotton Cloth and Yarn (Regulation of Movement) Order, 1947 (passed by the Governor of East Punjab) prohibiting export of cotton cloth and yarn to any place outside India was questioned as being beyond the powers of the Governor under the authority delegated to him by the Central Government under S. 4 of the Essential Supplies (Temporary Powers) Act, 1946 — The ground of attack was that the control of *exports* was not within the scope and purpose of the E. S. T. P. Act (1946) *firstly*, because the word "export" was not mentioned in the Act which only referred to production, distribution, trade and commerce etc., and *secondly*, because there was another set of legislation *viz.*, Import and Export Control Act, 1947 dealing with the subject of control of export. *Held* as to first argument that the E. S. T. P. Act (1946) was wide enough to cover control of *export*. As regards second argument, *Held* that the scopes and objects of the two Acts were quite *distinct* and they could exist side by side and be in operation at one and the same time. Though there was no question of any competition between a State law and a Central law in this case, it illustrates the principle that when neither of the laws aim at being *exhaustive* on the subject, both can exist and operate side by side).

1950 FC 59 (64) (Pr 14) [AIR V 37 C 5] : 1949 FCR 693 : ILR 29 Pat 185 : 51 Cri L Jour 921 (FC), *Lakhi Narayan Das* v. *Province of Bihar*. (Bihar Maintenance of Public Order Ordinance (IV of 1949), S. 21 — Section 21 of the Ordinance is not repugnant to S. 54, Criminal P. C. and is not therefore invalid.)

1942 FC 27 (30, 31) [AIR V 29] (FC), *Megh Raj* v. *Allah Rakhia*. (Punjab Restitution of Mortgaged Property Act 4 of 1938 does not in terms take away any rights which mortgagee may have under Ss. 69, 70, Contract Act and no particular provision of the Act can be said to be repugnant to those provisions of the Contract Act — Nor is the Punjab Act repugnant to S. 37, Contract Act, S. 9 of the Civil P. C. or

Limitation Act, as these provisions are expressly subject to special provisions — No question of repugnance to Transfer of Property Act as it does not apply to Punjab.)

1956 Trav-Co 19 (23) (Pr 17) [(S) AIR V 43 C 5] : ILR (1955) Trav-Co 741 (FB), *P. M. Bramadathan Nambooripad* v. *C. D. Board.* (New grounds of disqualification added in S. 66 of Trav-Cochin Hindu Religious Institutions Act, 1950, will certainly affect persons convicted by a criminal Court of offences involving moral turpitude and the members of the Legislature, but that does not necessarily mean that the two new grounds of disqualification are anything more than an *addition or supplement* to the four that already existed in the Cochin Hindu Religious Institutions Act (1 of 1081) when the Constitution came into force.)

1955 Trav-Co 220 (223) (Pr 13) [(S) AIR V 42 C 83] : 1955 Cri L Jour 1289 (FB), *P. K. Velayudhan, In re.* (Section 21, Travancore-Cochin Sales Tax Act, 1125, is not repugnant to any of the provisions of the Code of Criminal Procedure, 1898, or the Indian Evidence Act, 1872 : AIR 1954 Mad 833, Dissented from).

1955 Andhra 181 (183) (Pr 15) [(S) AIR V 42 C 66] : 1955 Cri L Jour 1233, *Nagabhushanam* v. *Nagendramma.* (Madras Hindu (Bigamy Prevention and Divorce) Act (6 of 1949), S. 4(1), Proviso is evidently based on the provisions of S. 57 of the Indian Divorce Act. There is no inconsistency between the Proviso and S. 494, I. P. C.)

1955 Hyd 194 (200) (Pr 28) [(S) AIR V 42 C 55] : ILR (1955) Hyd 510 (DB), *Joint Family Firm of Jamnalal Ramlal Kimtee* v. *Kishendas.* (The Civil P. C. does not cover the same field as the Hyderabad Jagirdars Debt Settlement Act XII of 1952 and accordingly the provisions of the Act cannot become void on the ground of repugnancy).

1954 Vindh Pra 24 (28, 31) [AIR V 41 C 9], *Mordhwaj Singh* v. *Vindhya Pradesh State.* (No repugnancy between V. P. Abolition of Jagirs and Land Reforms Act, 1953, and Rewa Land Revenue and Tenancy Code. The test is whether the new provision necessarily restricts the operation of the Code.)

1945 Mad 19 (20) [AIR V 32] : ILR (1945) Mad 398 (DB), *Lakshmi Narasimha Rao* v. *Madras Province.* (Section 3, Madras Restoration of Village Officers (Validation) Act, 18 of 1939, is not in conflict with last paragraph of S. 4, Evidence Act. There is no connection between the two. Section 3, Madras Act, is not repugnant to any other section of the Evidence Act.)

1954 Punj 241 (242) [AIR V 41 C 118] (DB), *Sadhu Singh* v. *Financial Commissioner.* (Section 2 of East Punjab Requisitioning of Immovable Property (Temporary Powers) Act (48 of 1948) (as amended by East Punjab Act 11 of 1951) is not repugnant to provisions of Ss. 8(4), 12, 16, 40 and 52 of Administration of Evacuee Property Act, 1950).

(1902) 1 KB 160 (164) : 71 LJ KB 105, *Gentel* v. *Rapps.* (A bye-law made under the Tramways Act, 1870 (33 and 34 Vict. C. 78) providing that no person shall use offensive language in a tram car was held to be consistent with the Town Police Clauses Act, 1847, which punished any person who in any street used offensive language to the annoyance of the residents or passengers, because the latter law (relating as it did, to nuisances in streets) did not intend to deal with or affect the power to make bye-laws under special circumstances and dealing with particular places (namely bye-laws relating to nuisances in tram cars.)

(z7) Identity of subject and pith and substance rule.

It has been stated above that repugnancy necessarily denotes the identity of the subject-matter between the two laws which are repugnant to each other. This identity of subject matter does not, however, mean that in *pith and substance* the two laws must deal with the same subject so as to fall within the same Legislative List. As seen in NOTE 12, even where one of the laws deals with a subject in pith and substance and the other deals with it only in an incidental way, the two laws would still be laws dealing with the same subject for the purpose of the question of repugnancy.

But it is clear that even in such cases the scope for repugnancy is limited to the matter which *both* the laws deal with. There would be no question of repugnancy, therefore, with regard to the matters which the respective laws deal with in *pith and substance*, because *ex-hypothesi* such matters are not the same. It is in this light that decisions like that of the Federal Court in *Ralla Ram* v. *Province of East Punjab*,[91] must be understood. It was held in that case that the Punjab Urban Immovable Property Tax Act, 17 of 1940, fell in pith and substance within Item 42 (Taxes on lands and buildings, hearths and windows) of the Provincial List of the Government of India Act of 1935, and not within Item 54 (Taxes on income other than agricultural income) of the Federal List in that Act. It was, therefore, held that there was no conflict between the above Punjab Act and the Income-tax Act (although, in fact, the issue before the Court was only about the *vires* of the Punjab Act and not about repugnancy). Thus, the fact that in pith and substance the matters dealt with by two laws are different only means that as regards *those matters* there can be no repugnancy. It does not mean that as regards the matter

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(1900) 1 Ch 10 (14, 15) : 69 LJ Ch 27, *Thomas* v. *Sutters*. (A bye-law, (made under S. 23 of the Municipal Corporation Act, 1882 (45 and 46 Vict. C 50)) that no person shall frequent or use any street for the purposes of betting was held to be good and not repugnant to the general law, the Metropolitan Streets Act, 1867, S. 23 of which provided that any three or more persons assembled together in any part of a street, for the purpose of betting shall be liable to a penalty. The ground of decision was in effect that the general law in this case did not occupy the same field as the bye-law; the one was concerned with the subject of street obstruction and the other with that of betting).
[*See also* 1955 Bom 35 (38) (Pr 4) [(S) AIR V 42 C 8] : ILR (1955) Bom 49 (DB), *Basantilal* v. *Bansilal*. (Bombay Forward Contracts Control Act (64 of 1947), S. 8 does not remove prohibitions imposed by Central legislation — Forward contracts in oilseeds dated 26-2-1952 and 5-3-1952 held illegal. All that S. 8 does is to declare that forward contracts will be illegal unless they comply with the procedure laid down in S. 8. The section does not purport to remove the illegality imposed by the Central Act. It is one thing to declare a certain contract illegal; it is entirely another thing to declare an illegal contract legal.)

[91] 1949 FC 81 (88) [AIR V 36 C 13] : 1948 FCR 207 (FC).

which is dealt with in pith and substance by one law and incidentally trenched upon by another law there can be no repugnancy.

The doctrine of pith and substance is applicable when the question is whether a law is "with respect to" a matter in a particular Legislative List, e. g., whether a particular "existing law" or a particular law made by the Legislature of a State is with respect to one of the matters enumerated in the Concurrent List. See NOTE 12.

(z8) Repugnancy distinguished from incompetency of legislation.

(z8) Repugnancy distinguished from incompetency of legislation — See Notes 2 and 12.

16. Proof of repugnancy.—As seen in NOTE 6 on the Preamble, the presumption is in favour of the constitutionality of a statute. This principle will apply also where a Provincial or a State law is impugned as being repugnant to a Central law or an existing law. Hence, unless the alleged repugnancy is clearly established, it should not be held that an Act is bad for repugnancy. Every effort should be made to reconcile and construe both the laws so as to avoid their coming into collision with each other and it should be seen whether they really do not operate in different fields.[1]

The onus of proving repugnancy is on the party alleging it.[2]

(a) Introductory.

17. Effect of repugnancy.—Clause (1) of the article provides that the repugnancy of a State law to a Central law or existing law shall make the State law void to the extent of the repugnancy and that the Central law or the existing law, as the case may be,

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Article 254 — Note 16

[1] 1949 FC 81 (88) (Pr 19) [AIR V 36 C 13] : 1948 FCR 207 (FC), *Ralla Ram* v. *Province of East Punjab.* (Where there is an apparent conflict between an Act of the Federal Legislature and an Act of the Provincial Legislature, the Court must try to ascertain the pith and substance or the true nature and character of the conflicting provisions, and before an Act is declared *ultra vires,* there should be an attempt to reconcile the two conflicting jurisdictions, and, only if such a reconciliation should prove impossible, the impugned Act should be declared invalid: AIR 1941 FC 47; AIR 1939 FC 1 and *Gallagher* v. *Lynn,* 1937 App Cas 863, Rel. on; AIR 1947 PC 60, Ref.)

1939 FC 74 (83) [AIR V 26] (FC), *Shyamakant* v. *Rambhajan.*

1941 Lah 177 (180) [AIR V 28] (FB), *Megh Raj* v. *Allah Rakhia.*

[*See also* 1955 NUC (USA) 2264 [AIR V 42] : 97 Law Ed 231 (235), *T. Schwartz* v. *States of Texas.* (If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the State unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.)

[2] 1939 FC 74 (83) [AIR V 26] (FC), *Shyamakant* v. *Rambhajan.*

1953 Pat 14 (22) (Pr 23) [AIR V 40 C 6] : ILR 31 Pat 921 (FB), *Mangtulal* v. *Radhashyam.*

1951 Mys 72 (81) (Pr 23) [AIR V 38 C 33] : ILR (1951) Mys 284 : 52 Cri L Jour 992 (FB), *Abdul Khader* v. *State of Mysore.*

shall prevail. As has been seen in Note 15, repugnancy connotes inconsistency and the essence of inconsistency is that the two laws cannot operate at the same time. Hence, necessarily, repugnancy means that one of the laws alone can operate and the other must to the extent of repugnancy cease to operate. This is exactly what cl. (1) has provided.

The language used in the article, namely, that the State law "shall, to the extent of the repugnancy, be void" is similar to that used in Art. 13 which provides that laws which are inconsistent with fundamental rights "shall, to the extent of such inconsistency, be void". The language of Art. 251 also is of similar import.

(b) 'Void' meaning of.

The word "void" means in the context of this article "inoperative".[1] The Supreme Court has held in *Keshavan* v. *State of Bombay*,[2] that the word "void" in Art. 13 does not mean void *ab initio* or for all purposes. The same meaning of the word "void" will, it is conceived, hold good in the case of this article also.

(c) Repugnant law not ultra vires.

Thus, the effect of repugnancy is not to make the repugnant Provincial law *ultra vires*.[3] "*Ultra vires*" affects the competency of the Legislature to enact the law, while in the case of a Provincial law which is bad for repugnancy, there is no question of competency of the Legislature to pass the Act. When the law is *ultra vires* as beyond the competency of the Legislature, it suffers from an *inherent defect*, which does not depend on any *external factor*. But when a law is bad for repugnancy, the defect is due to the existence of another law to which it is repugnant, and thus, the defect is dependent on an *external factor*. The moment that factor ceases to exist, the repugnancy will also cease to exist.

(d) Effect of repeal of the paramount law.

Thus, when a State law is held to be bad for repugnancy to a Central law, the validity of the State law will revive on the repeal of the Central law.[4] This is implicit in the phrase "to the extent of the repugnancy".

Article 254 — Note 17

[1] 1951 Punj 409 (411) (Pr 11) [AIR V 38 C 120] : 52 Cri L Jour 886 (DB), *Piara Kishen* v. *Crown*.

[2] 1951 SC 128 (130) (Pr 7) [AIR V 38 C 20] : 1951 SCR 228 : ILR (1951) Hyd 294 : 52 Cri L Jour 860 (SC).

[3] 1939 FC 74 (84) [AIR V 26] (FC), *Shyamakant* v. *Rambhajan*.
1951 Punj 409 (411) (Pr 11) [AIR V 38 C 120] : 52 Cri L Jour 886 (DB), *Piara Kishen* v. *Crown*.
1941 Pat 99 (105) [AIR V 28] (DB), *Sagarmal* v. *Bhuthu Ram*.
66 Com LR 557, *Carter* v. *Egg and Egg Pulp Marketing Board*. (Taken from AIR 1951 Punj 409 (411).)
[See however 1951 Mys 72 (Pr 67) [AIR V 38 C 33] : ILR (1951) Mys 284 : 52 Cri L Jour 992 (FB), *Abdul Khader* v. *State of Mysore*. (Mallappa J. (minority view) : "Void" in Art. 13(1) indicates *non-existence* of the repugnant law.)]

[4] 1951 Punj 409 (411) (Pr 11) [AIR V 38 C 120] : 52 Cri L Jour 886 (DB) *Piara Kishen* v. *Crown*.

No doubt, in ART. 251, the phraseology is quite explicit and under that article the words used are "the law made by the Legislature of a State shall, to the extent of the repugnancy, but so long only as the law made by Parliament continues to have effect, be inoperative". It will be seen that ART. 251 uses the expression "inoperative" instead of "void" and further it contains the qualification "so long only as the law made by Parliament continues to have effect". Notwithstanding these differences in the language used in the two articles, the meaning of the two provisions is the same, so far as the question of effect of repugnancy is concerned. For repugnancy means nothing more and nothing less than inconsistency and inconsistency necessarily connotes the existence of *two* factors; the moment such a state of things ceases to exist by the disappearance of one of the inconsistent elements, the inconsistency must necessarily cease and, therefore, there will no longer be any repugnancy. And as the article only contemplates that the Provincial law should be void *to the extent of the repugnancy* it follows that its validity will revive on the disappearance of the repugnancy. Thus, the repugnancy only causes the repugnant State law to *remain in abeyance* unless and until the Central law is repealed.[5]

In this connection, the observations of Latham, C. J. in *Carter* v. *Egg and Egg Pulp Marketing Board*,[6] may be quoted. In that case, the Supreme Court of Australia was called upon to interpret the provisions of S. 109 of the Australian Constitution which provides that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall, to the extent of inconsistency, be invalid. Latham, C. J. observed as follows in interpreting the section :

> "This section applies only in cases where apart from the operation of this section both the Commonwealth and the State laws which are in question would be valid. If either is invalid *ab initio* by reason of lack of power no question can arise under the section. The word 'invalid' in the section cannot be interpreted as meaning that a State law which is affected by the section becomes *ultra vires* in whole or in part. If the Commonwealth law were repealed, the State law would again become operative (*R.* v.

(1896) 1896 App Cas 348 (367) : 65 LJ PC 26, *Attorney-General for Ontario* v. *Attorney-General for the Dominion*. (In so far as the provisions of S. 18, Liquor License Act (Ontario), comes into collision with the provisions of Canada Temperance Act, 1886 they must yield to the Dominion legislation and must remain in abeyance unless and until the Act of 1886 is repealed by the Parliament which passed it.)

66 Com LR 557, *Carter* v. *Egg and Egg Pulp Marketing Board*.

[5] (1896) 1896 App Cas 348 (367) : 65 LJ PC 26, *Attorney-General for Ontario* v. *Attorney-General for the Dominion*.

[6] 36 Com LR 557.

> *Brisbane Licensing Court, Ex parte Daniell*[7] (per Higgins, J.) (*cf. Attorney-General for Ontario* v. *Attorney-General for the Dominion*[8] and *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd*[9]). Thus, the word 'invalid' should be interpreted as meaning inoperative. This is I think made clear by the provision that the Commonwealth law shall prevail, i. e., the Commonwealth law has superior authority and takes effect to the exclusion of the inconsistent State law."

But where a statute is *repealed* by another statute, the repeal of the latter statute will not by itself restore the former.[10] See General Clauses Act (1897), S. 7.

(e) Central Legislature, power of, to repeal Act of State Legislature.

Although a State law which is repugnant to a Central law will be void to the extent of repugnancy and although it thus lies within the power of the Central Legislature to render nugatory a law of the Provincial Legislature by itself enacting an inconsistent law, it is not open to the Central Legislature to directly repeal the Provincial law.[11] In *Shibnath* v. *Porter*,[12] Mitter, J. of the Calcutta High Court observed as follows :

> "Where one legislative body seeks to do away with the enactment of another legislative body equally competent to legislate on the subject by creating what appears *prima facie* to be a repugnancy, it is exclusively within the province of the Courts to decide whether in fact the repugnancy exists, and if it does, to decide which enactment should prevail. . . . . . .
>
> Repeal by repugnancy of the law made by one competent legislative body by another legislative body equally competent to legislate on the same subject is one thing and direct repeal by one of the legislative enactments of the other is another thing. In cases of the first type the Court has jurisdiction to decide, but in the last type that jurisdiction would be robbed. This, in my judgment, is a distinction of a fundamental nature, which prevents applicability of the principle, that where an authority can do away with a thing indirectly it can also do away with it directly, to a case of the type which we have before us, a case where one

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[7] (1920) 28 CLR 23.

[8] (1896) 1896 App Cas 348 : 65 LJ PC 26.

[9] (1920) 28 CLR 129 (Aus).

[10] ('97) ILR 25 Cal 333 (336) (DB), *Deputy Legal Remembrancer* v. *Ahmad Ali.*

[11] 1943 Cal 377 (385) [AIR V 30] (SB), *Shib Nath* v. *Porter.*
(1896) 1896 App Cas 348 (366) : 65 LJ PC 23, *Attorney-General for Ontario* v. *Attorney-General for the Dominion.*
[*See also* 1954 SC 752 (758) [AIR V 41 C 174] : 1955 SCR 799 : 1954 Cri L Jour 1822 (SC), *Zaverbhai* v. *State of Bombay.* (On a question under Art. 254(1) whether an Act of Parliament prevails against a law of the State, no question of repeal arises.)

[12] 1943 Cal 377 (385) [AIR V 30] (SB).

Legislature by its express provisions seeks to override the Act of another Legislature, both the Legislatures deriving their powers from the same paramount Legislature and both being equally competent to legislate on the subject."

So also, in *Attorney General for Ontario* v. *Attorney General for the Dominion of Canada,*[13] Lord Watson, dealing with an Act of the Dominion Parliament of Canada, which, in express terms, had repealed an Act of the Legislature of the Province of Upper Canada (Ontario), the subject-matter of both the Acts being the prohibition of the sale of wine and fermented liquors, laid down the law in the following words :

> "But the Dominion Parliament has no authority conferred upon it by the Act (The British North America Act, 30 Vict. c. 3) to repeal directly any Provincial statute, whether it does or does not come within the limits of jurisdiction prescribed by SEC. 92. The repeal of a Provincial Act by the Parliament of Canada can only be effected by repugnancy between its provisions and the enactments of the Dominion; and if the existence of such repugnancy should become a matter of dispute, the controversy cannot be settled by the action either of the Dominion or of the Provincial Legislature, but must be submitted to the judicial tribunals of the country. In their Lordships' opinion, the express repeal of the old Provincial Act of 1864 by the Canada Temperance Act of 1886 was not within the authority of the Parliament of Canada."

(f) Repugnancy purely matter for determination by Court, not Legislature.

Thus, 'repugnancy' and 'repeal' are altogether different concepts. 'Repeal' is a direct legislative act, while 'repugnancy' is a matter purely for the determination of the *Courts*. It is not open to a Central Legislature to declare that a certain Provincial law is bad for repugnancy to a law made by itself. This is a matter entirely for the Courts to determine.[14]

(g) Exception to rule that one Legislature cannot repeal Act of another Legislature.

There is, however, an exception to the rule that one Legislature cannot repeal a law passed by another Legislature. And this exception has been brought into existence for the first time by a special provision in this Constitution. This special provision is contained in the Proviso to cl. (2) of this article which applies to cases in which a

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[13] (1896) 1896 App Cas 348 (366) : 65 LJ PC 26.

[14] 1943 Cal 377 (385) [AIR V 30] (SB), *Shib Nath* v. *Porter.*
1954 SC 752 (753) [AIR V 41 C 174] : 1955 SCR 799 : 1954 Cri L Jour 1822 (SC), *Zaverbhai* v. *State of Bombay.*
[*See* 1942 FC 27 (30, 31) [AIR V 29] (FC), *Megh Raj* v. *Allah Rakhia.* (Any attempt to exclude attack on repugnant provisions by barring the jurisdiction of civil Courts will amount to attempting to do by indirect means what the Provincial Legislature was not entitled to do by direct means.)]

State law has been passed with the President's assent under cl. (2), so as to avoid the effect of its being repugnant to a Central law or an existing law on a concurrent subject. The provision is to the effect that it is open to the Central Legislature to subsequently pass a law adding to, amending, varying or repealing the State law made with the President's assent under cl. (2). There was no such provision in the corresponding SEC. 107 of the Government of India Act, 1935.[15] But except in cases covered by the Proviso to cl. (2), the Central Legislature cannot repeal directly a law of the State Legislature on a concurrent subject, although it can pass a law which is inconsistent with the State law and which by reason of such inconsistency will render the State law nugatory, so long as the Central law is operative.

(h) Retrospective effect.

Although repugnancy and repeal are quite different in their nature, yet in one respect their effect is similar. Just as it is an established principle of the general law that the repeal of an enactment cannot affect past transactions or vested rights, so also repugnancy cannot have a retrospective effect. Where a Provincial law becomes bad for repugnancy by the subsequent enactment of an inconsistent Central law, the Provincial law will not become void *ab initio* so as to affect past matters.[16]

(i) Duty of Court when repugnancy is alleged.

As already stated, repugnancy will affect the validity of a State law only *pro tanto* and not as a whole. So, it is the duty of the Court, whenever repugnancy is alleged, to compare carefully the two competing laws and determine exactly how much portion is repugnant and to declare only that portion void for repugnancy.[17]

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[15] *See* 1954 SC 752 (756) [AIR V 41 C 174] : 1955 SCR 799 : 1954 Cri L Jour 1822 (SC), *Zaverbhai* v. *State of Bombay.* (The position under S. 107 (2) of the Govt. of India Act, 1935, was the same as that laid down in *Att. Gen. for Ontario* v. *Att. Gen. for the Dominion,* (1896) 1896 App Cas 348.)

[16] *See* 1951 SC 128 (130) [AIR V 38 C 20] : 1951 SCR 228 : ILR (1951) Hyd 294 : 52 Cri L Jour 860 (SC), *Keshavan* v. *State of Bombay.* (Art. 13(1) not retrospective).

1951 Bom 188 (190) (Pr 6) [AIR V 38 C 38] : ILR (1950) Bom 529 : 52 Cri L Jour 30 (FB), *Keshav Madhav Menon In re.* (Art. 13(1) not retrospective.)]

1951 Mys 72 (95, 96, 97) (Prs 63, 65, 67) [AIR V 38 C 33] : ILR (1951) Mys 284 : 52 Cri L Jour 992 (FB), *Abdul Khader* v. *State of Mysore.* (Per Venkataramayya and Balakrishnaiya JJ. : Pending proceedings not affected by Art. 13(1) — Mallappa J. dissenting : "Void" indicates lack of existence)].

[17] 1939 FC 74 (84) [AIR V 26] (FC), *Shyamakant* v. *Rambhajan.* (The words 'to the extent of the repugnancy' occurring in S. 107, G. I. Act, 1935, indicate that it is not essential that the whole Act nor even a whole section must be declared invalid, but that it is necessary to ascertain exactly how much of it is void on account of repugnancy.)

Where, however, the affected portion is not severable from the rest of the law, the entire law would be affected by the repugnancy, and will have to be declared as void on that account.[18] But when the inconsistent portion is severable, the invalidity on account of repugnancy will only extend to that portion.[19]

(j) No repugnancy between State law and Central law on a subject— Effect — Both apply.

Where there is no repugnancy between a State law and a Central law dealing with the same subject, *both* laws will apply within the State. The article provides that when there is repugnancy between a Central law and a State law on a concurrent subject, the Central law will prevail and the State law shall, to the extent of repugnancy, be void. From this it does not follow that when there is no repugnancy between the two laws, the Central law shall cease to have any effect within the State and that the State law alone will apply there.

The words "shall prevail" used in clause (1) of this article with reference to the Central law are used in the sense of prevailing *in opposition* to the State law and not merely in the sense of being in force. Hence, the *operativeness* of the Central law within the limits of the State does not depend upon the existence of a conflict with the State law. When there is no such conflict there is no question of either law *prevailing*, but *both* will be applicable and either or both of them can be resorted to.

This rather obvious explanation has been necessitated by two decisions of the Travancore-Cochin High Court.[20] In those two cases, the Central law and the State law in question were in identical terms. A certain action had been taken under the *Central* law and this was impeached before the Court on the ground that under the circumstances, the law applicable was the *State* law and not the Central law.

Obviously, the argument was not correct. If the State law was repugnant to the Central law, then the State law would be void in the face of the Central law, and it is only the Central law that would have applied. If the State law was *not* repugnant, this would only have meant that *both* the laws would have applied. Hence, the action taken under the Central law could not be impeached even in this view. It is not clear why in the above cases the Travancore-Cochin High Court did not reject on this short ground the plea as to the invalidity of the

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1953 Pat 14 (21) (Pr 19) [AIR V 40 C 6] : ILR 31 Pat 921 (FB), *Mangtulal* v. *Radhashyam.* (It is the Court's duty to see, if it is possible to compare the two enactments so to speak quantitatively, in order that what is excessive or contradictory in the State enactment and nothing more shall be deemed void.)

[18] 1939 FC 74 (83) [AIR V 26] (FC), *Shyamakant* v. *Rambhajan.*

[19] 1939 FC 74 (83) [AIR V 26] (FC), *Shyamakant* v. *Rambhajan.*

[20] 1951 Trav-Co 203 (207) (Pr 15) [AIR V 38 C 81] : ILR (1951) Trav-Co 458, *Nagalinga Nadar Sons* v. *Ambalapuzha Taluk Head Local Conveyance Workers' Union, Alleppey.*
1952 Trav-Co 371 (373, 374) [AIR V 39], *Ayyaswami Nadar* v. *Joseph.*

action taken under the Central law, but went elaborately into the question of repugnancy and held that the State law was bad for repugnance and that the Central law alone was applicable to the State.

18. "Shall, to the extent of the repugnancy, be void."—See NOTE 17.

19. Power of Central Legislature to repeal law passed by State Legislature on Concurrent subject.—See under NOTE 17.

20. Repeal by implication.—It has been seen in NOTE 15 that the same test applies for seeing whether one law is repugnant to another as for determining whether one law is repealed impliedly by a later law. The principle on which the rule of implied repeal rests is that if the subject-matter of the later legislation is identical with that of the earlier one and the two pieces of legislation cannot both stand together, then the earlier is repealed by the later enactment.[1] Repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together, in which case the maxim *legis posteriores priores contrarias abrogant* applies. Unless the two acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied.[2]

Article 254 — Note 20

[1] 1954 SC 752 (758) [AIR V 41 C 174] : 1955 SCR 799 : 1954 Cri L Jour 1822 (SC), *Zaverbhai* v. *State of Bombay.*

1953 Nag 58 (64) (Pr 34) [AIR V 40 C 25] : ILR (1952) Nag 770 : 1953 Cri L Jour 481 (DB), *Hiralal Sutwala* v. *State.* (Where a law takes away the rights conferred by a pre-existing law or substantially interferes with the rights conferred by such law with the result that the two laws cannot completely stand together, the earlier law must be deemed to have been repealed by implication to the extent of the inconsistency: *Ex parte John Caruthers* (1807) 103 ER 490; (1932) 2 KB 733 *Vauxhall Estates Limited* v. *Liverpool Corporation* and *Ellen Street Estates Ltd.* v. *Minister of Health* (1934) 1 KB 590, Rel. on).

(1932) 146 LT 167 (168) : (1932) 2 KB 733, *Vauxhall Estates Ltd.* v. *Liverpool Corporation.* (Land included in an improvement or reconstruction scheme made under the Housing Act, 1925, must be assessed on the basis provided by S. 46(1) of that Act, since by that Act there is an implied repeal *pro tanto* of the provisions of the earlier Act, viz., Acquisition of Land (Compensation of Assessment) Act of 1919 which are inconsistent with it. No Act of Parliament can say that no future Act of Parliament shall interfere with the provisions of the earlier Act.)

(1876) 1 Ex D 411 (414) : 35 LT 860, *Hill* v. *Hall.*

[*See also* 1952 Nag 393 (394) (Pr 5) [AIR V 39] : ILR (1953) Nag 324 : 1953 Cri L Jour 46 (DB), *W. G. Ambekar In re.* (If the two sections are repugnant the known rule is that the last must prevail: *Wood* v. *Riley,* (1867) 3 CP 26 at p. 27, Foll.)]

[2] (1891) 2 QB 267 (271, 272) : 60 LJ QB 505, *Kutner* v. *Phillips.*

(1922) 2 KB 66 (73, 74) : 91 LJ KB 568, *Wallwork* v. *Fielding.*

1954 Punj 241 (242) [AIR V 41 C 118] (DB), *Sadhu Singh* v. *The Financial Commissioner.*

Special Acts are not repealed by general Acts unless there is some express reference to the previous legislation or unless there is some necessary inconsistency in the two Acts standing together.[3]

It is a rule of construction relating to statutes that when the punishment or penalty is altered in degree but not in kind, the later provision would be considered as superseding the earlier one.[4]

In *Smith* v. *Benabo*,[5] Goddard J. observed as follows :

> "It is a well settled rule of construction that, if a later statute again describes an offence created by a previous one, and imposes a different punishment, or varies the procedure, the earlier statute is repealed by the later statute : see *Michell* v. *Brown*.[6] Per Lord Campbell."

21. President's assent—(Clause 2.)—Clause (2) provides for the curing of repugnancy which would otherwise invalidate a State law which is inconsistent with a Central law or an existing law. The clause provides that where the State law has been reserved for the consideration of the President and has received his assent, the State law would prevail in the particular State, notwithstanding its repugnance to a Central law or an existing law.[1] The corresponding

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(1614) 77 ER 1222 (1231, 1232) : 11 Coke Rep 56b (62b, 63a, 33b), *Foster's case*. (An affirmative statute shall not repeal a precedent affirmative law, unless the subsequent statute is contrary to the precedent law. Such contrariety may be (1) in quality, (2) in matter, (3) in respect of form prescribed.)

(1876) 1 Ex D 411 (414) : 35 LT 860, *Hill* v. *Hall*.

[3] (1922) 2 KB 66 (73, 74) : 91 LJ KB 568, *Wallwork* v. *Fielding*.

(1891) 2 QB 267 (272) : 60 LJ QB 505, *Kutner* v. *Phillips*.

1955 NUC (Orissa) 5693 [AIR V 42] (DB), *Ramdhan Das* v. *Kapil Sahu*.

('51) 1951 Ker L Tim 337 (341), *Gopalan* v. *Sippora*.

(1884) 10 App Cas 59 (68) : 54 LJP 9, *Seward* v. *Vera Cruz*.

[*See also* (1912) 1 KB 1 (8) : 81 LJ KB 24 (25), *Jenkins* v. *Great Central Railway*. (In general, a local Act of Parliament, in the absence of any indication of intention on the part of the Legislature, is not repealed or superseded by a general Act subsequently passed.)

[4] 1954 SC 752 (758) (Pr 10) [AIR V 41 C 174] : 1955 SCR 799 : 1954 Cri L Jour 1822 (SC), *Zaverbhai* v. *State of Bombay*. (Maxwell on Interpretation of Statutes, 10th Edn., pp. 187, 188 Ref. to.)

[5] (1937) 1 All ER 523 (526) : 106 LJ KB 367.

[6] (1858) 120 ER 909 (912) : 7 WR (Eng) 80.

Article 254 — Note 21

[1] 1954 All 538 (546) (Pr 14) [AIR V 41 C 216] : ILR (1954) 1 All 457 (FB), *Basti Sugar Mills Limited.* v. *State of Uttar Pradesh.* (Per V Bhargava J. : The U. P. Industrial Disputes Act, 1947, was reserved by the Governor of Uttar Pradesh for the assent of the Governor-General whose assent was obtained. If there be any repugnancy between its provisions and the provisions of the Central enactment contained in the Industrial Disputes Act (Act No. XIV of 1947), the U. P. Industrial Disputes Act, 1947 would prevail in Uttar Pradesh.)

S. 107 of the Government of India Act, 1935, also contained a similar provision.

The principle underlying the clause is that the President should apply his mind to what Parliament has enacted and also consider the local conditions prevailing in a particular State and if he is satisfied that judging by the local conditions, a particular State should be permitted to make a provision of law different from the provision made by Parliament, he should give his assent and thereupon the State legislation should prevail.[2]

The clause applies only to a law made by the Legislature of a Part A or Part B State. There is no similar limitation in cl. (1). See NOTE 3.

This clause will only apply where the State law and the Central law or the existing law, as the case may be, are *both* with respect to

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1955 NUC (LATI) 6123 [AIR V 42], *Millowners' Association, Bombay* v. *Rashtriya Mill Mazdoor Sangh, Bombay.* (Bombay Act 65 of 1954, since it was reserved for the assent of the President and has received his assent, will prevail over S. 33 of Industrial Disputes (Appellate Tribunal) Act (1950).)

1954 All 655 (657) (Pr 2) [AIR V 41 C 260] : 1954 Cri L Jour 1399 (DB), *Tej Bahadur Singh* v. *State.* (The U. P. Panchayat Raj Act, received the assent of the Governor-General before the Act was published in the U. P. Gazette. Under S. 107(2), Government of India Act, 1935, therefore, the provisions of the U. P. Panchayat Raj Act, in so far as they are repugnant to the provisions of Cr. P. Code and the Evidence Act, prevailed within the United Provinces and the validity of those provisions could not, therefore, be challenged when the Constitution came into force).

1954 Orissa 186 (188) (Pr 9) [AIR V 41 C 55], *H. Naik* v. *Kanhu Charan Das.* (Repugnancy between T. P. Act and Orissa Act I of 1952 cured by President's assent).

1952 All 88 (90) (Pr 11) [AIR V 39 C 29] (DB), *Mt. Govindi* v. *State of Uttar Pradesh.* (As the U. P. Act I of 1951 was reserved for the consideration of the President and has received his assent under Art. 254 (2), the Act is not invalid on the ground of its repugnancy with the Land Acquisition Act and so far as the State of Uttar Pradesh is concerned, the provisions of the Act prevail over the provisions of the Land Acquisition Act.)

1945 Bom 352 (355) [AIR V 32] : ILR (1946) Bom 119 (DB), *Hirji Laxmidas* v. *Francis Fernandez.*

[*See* 1939 FC 74 (76, 77) [AIR V 26] (FC), *Shyamkant* v. *Rambhajan.* (Case under corresponding Section 107 of Govt. of India Act, 1935).

1944 Pat 303 (305) [AIR V 31] (FB), *Deo Nandan* v. *Ram Prasad.* (Bihar Money-lenders Act (1939) which has received the assent of the Governor-General under S. 107(2) of the Government of India Act, 1935, will prevail against provisions of Negotiable Instruments Act dealing with rights of a contractual character.)

1952 Orissa 260 (266) (Pr 17) [AIR V 39) : 1952 Cri L Jour 1354 (DB), *Jagadish Patel* v. *Patel Tobacco Co.* (Do).

[2] 1955 Bom 35 (37) (Pr 3) [(S) AIR V 42 C 8] : ILR (1955) Bom 49 (DB), ***Basantlal* v. *Bansilal.***

a matter in the Concurrent List.[3] Clause (1) is expressly made subject to the provisions of this clause. Whether on account of this fact, the scope of cl. (1) has been limited to the cases covered by this clause has been considered in NOTE 12, in which has also been considered the question whether there is possibility of repugnancy at all between laws with respect to matters outside the Concurrent List. Whatever the position with regard to cl. (1), it is clear that the scope of cl. (2) is limited to laws dealing with matters in the Concurrent List.

The clause applies, in the case of repugnancy between a State law and a Central law, only where the Central law is earlier than the State law, while cl. (1) will apply whether the Central law is earlier or later than the State law. Thus, under cl. (1), even where at the time of the enactment of a State law there is no Central law to which it is repugnant but subsequently a Central law is passed and the State law is repugnant to such later Central law, the repugnancy will affect the validity of the State law. But the President's assent under cl. (2) will be sufficient only to get over the repugnancy of a State law with reference to an earlier Central law. In other words, it is only repugnancy to a Central law which is in force at the time when the State law is enacted that can be cured by the President's assent under cl. (2). The fact that the President's assent has been obtained for a State law under cl. (2) will not make it immune from attack for repugnancy to a *subsequent* enactment of the Central Legislature.[4] This is expressly provided in the Proviso to the clause. Under S. 107, cl. (2) of the Government of India Act, 1935, also there was such a provision, which expressly saved the power of the Federal Legislature to enact further legislation with respect to the same matter, notwithstanding that the Provincial law had received the assent of the Governor-General or His Majesty under the clause. (See NOTE 22.)

The mere fact that the State law deals with a subject in the Concurrent List which is also dealt with by an existing law or a Central law will not necessitate the President's assent for the State law to confer validity on it. There must be actual clash between the State law and an existing law or a Central law, in order to make such assent necessary for the validity of such State law.[5]

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[3] 1952 Orissa 260 (266) (Pr 17) [AIR V 39] : 1952 Cri L Jour 1354 (DB), *Jagdish* v. *Patel Tobacco Co.* (The Provincial Act cannot prevail if there is any inconsistency between any of its provisions and any Central Act in respect of matters in the federal legislative list.)

1951 Punj 409 (411) (Pr 10) [AIR V 38 C 120] : 52 Cri L Jour 886 (DB), *Piara Kishan* v. *Crown.* (Where the alleged inconsistency between a Dominion law & a Provincial law is not with respect to any of the matters enumerated in the *concurrent legislative list* but the matter is exclusively in the *federal* sphere, the inconsistency cannot be resolved with the help of S. 107, Government of India Act 1935.)

[4] 1953 Bom 371 (377) (Pr 18) [AIR V 40 C 118] : ILR (1954) Bom 117 : 1953 Cri L Jour 1602 (DB), *State* v. *Zaverbhai Amirdas.*

1952 Orissa 260 (236) (Pr 17) [AIR V 39] : 1952 Cri L Jour 1354 (DB), *Jagadish* v. *Patel Tobacco Co.*

There is nothing to preclude a State Legislature from inserting in an enactment which in pith and substance deals with a *subject in the State List* a provision which is repugnant to an existing law with respect to a matter in the *Concurrent List*, after taking care to comply with the procedure in cl. (2). In other words, it is not necessary, in order to avail of the benefit of cl. (2), that the repugnant provision in the State law should constitute an independent enactment and not merely form part of another enactment.[6]

The President's assent is not necessary for the repeal by the State Legislature of a State law which has been passed with the President's assent under cl. (2). The fact that a law has been reserved for the President's assent and has received his assent under cl. (2) does not make the President part of the Legislature, so as to bring into play the principle that a law can be repealed only by the Legislature by which it was passed.[7]

It will also be seen that the effect of the President's assent is not to remove the repugnancy but only to remove its effect. Hence, the repeal of a State law which has received the President's assent under cl. (2) only means the *removal of repugnancy* and obviously, the President's assent is not necessary for such removal.[8]

Although a State law does not itself contain any repugnant provision but merely extends the duration of a previous temporary law, which temporary law was repugnant to an existing law with respect to a Concurrent subject, the State law must be deemed to be repugnant to an existing law within the meaning of the clause and would require the President's assent for its validity.[9]

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[5] 1951 Cal 346 (348) (Prs 12, 13) [AIR V 38 C 82] : ILR (1952) 1 Cal 168 (DB), *Nalini Mohan* v. *Dist. Mag., Malda.*

[6] 1949 Mad 307 (314, 316) (Prs 20, 27) [AIR V 36 C 146] : ILR (1949) Mad 377 : 50 Cri L Jour 405 (SB), *Narayanswami Naidu* v. *Inspector of Police.*

[7] 1951 Pat 246 (251) (Pr 8) [AIR V 38 C 50] : ILR 29 Pat 252 (DB), *Kameshwar Singh* v. *Province of Bihar.*

[*See* (1882) 7 App Cas 136 (147) : 51 LJ PC 26, *Dobie* v. *The Temporalities Board.* (Powers of Quebec Provincial Legislature to repeal or amend pre-Constitution Act of Parliament of Province of Canada is co-extensive with the legislative power of the Provincial Legislature.)]

[8] 1951 Pat 246 (251) (Pr 8) [AIR V 38 C 50] : ILR 29 Pat 252 (DB), *Kameshwar Singh* v. *Province of Bihar.* (The Bihar Abolition of Zamindaries Repealing Act, 9 of 1950, is *intra vires* the Provincial Legislature. The Act does not create any repugnancy; on the other hand it *removes* the repugnancy, if any, created by the Bihar Abolition of Zamindaries Act. The absence of assent of the Governor-General does not invalidate it. It is wrong to assume from S. 107 that the Governor-General as representing His Majesty is part of the legislative machinery of a Province. The legislative machinery is indicated by S. 60 and not by S. 107.)

Even though a bill is not reserved for the consideration of the President, the subsequent assent of the President will be sufficient under Art. 255.[10]

22. Proviso to clause (2).—It has been seen in NOTE 21 that the obtaining of the President's assent to the State law under cl. (2) serves to cure the repugnancy of the State law only with reference to an earlier Central law, and that it cannot confer validity on the State law with reference to *future* Central laws. This is made explicitly clear by the Proviso.[1] The corresponding S. 107 of the Government of India Act, 1935, also contained a similar provision tagged to cl. (2) of the section at end of the first paragraph. The material words in cl. (2) of S. 107 were as follows :

> "But nevertheless the Federal Legislature may at any time enact further legislation with respect to the same matter."

Apart from the fact that a separate Proviso has now been added instead of the matter being tagged on to the substantive part of the clause itself, it will be seen that S. 107 (2) of the Government of India Act only provided that further legislation about the same matter could be enacted by the Federal Legislature. There was no express provision, as there is in the Proviso to cl. (2) of the present article, that the Central Legislature can also add to, amend, vary or repeal the law made by the State Legislature by the President's assent. This power of adding to, amending, varying or repealing the law made by the Legislature of a State is a new power conferred for the first time on the Central Legislature under this Constitution. Such a power could not be implied merely from the provision in S. 107 (2) of the Government of India Act, 1935, that the Central Legislature could enact further legislation with respect to the same matter. The reason is that such further legislation could not include a law repealing, amending, varying or adding to the law of the

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[9] 1953 Pat 14 (17, 21, 24) [AIR V 40 C 6] : ILR 31 Pat 921 (FB), *Mangtulal* v. *Radhashyam.*

[10] *See* 1943 Nag 312 (312) [AIR V 30], *Balmukund v. Gadi Narayan.* (Case under corresponding Ss. 107 and 109 of the Government of India Act, 1935.)

Article 254 — Note 22

[1] *See* 1955 Bom 35 (37) (Pr 3) [(S) AIR V 42 C 8] : ILR (1955 Bom 49 (DB), *Basantlal* v. *Bansilal.* (Whether under the Constitution or under the Government of India Act, the Central Legislature or Parliament had always the power to override any legislation passed by a Provincial or State Legislature provided the subject dealt with found a place in the Concurrent List. That important principle is reiterated in Art. 254 and the proviso to Cl. (2) merely emphasises that important principle.)

Provincial Legislature. As seen in NOTE 17, it is not competent to one Legislature to directly repeal a law passed by another Legislature, although it may be open to it to enact a law which would have the effect of rendering invalid, on the ground of repugnancy to itself, a law passed by the other Legislature. This power of adding to, amending, varying or repealing the law passed by another Legislature has now been conferred under the Proviso to cl. (2) of this article. But this cannot whittle down the power already possessed by the Central Legislature and it cannot be argued that a later Central law which does not *directly* add to, amend, vary or repeal the State law cannot affect such law.[2]

As stated already, the power of the Central Legislature to enact a law on the same subject has been both expressly and impliedly saved under cl. (2) of this article.[3] If and when the Central Legislature enacts a law on the same matter and the State law is repugnant to such Central law, then cl. (1) will come into play and the State law would become void to the extent of the repugnancy.

Zaverbhai v. *State of Bombay*[4] is a case in which the Supreme Court held that the Central Legislature passed an Act on the "same subject" within the meaning of Proviso to cl. (2) and that, therefore, the Provincial law, which was at variance with it, was rendered bad for repugnancy, although such Provincial law had been reserved for and obtained the assent of the Governor-General under S. 107 (2) of the Government of India Act of 1935. For a discussion of the case see NOTE 15.

It has also been pointed out in NOTE 2 that the Proviso to cl. (2) of this article was not applicable to the facts of the case in *Zaverbhai's case*,[5] but that the decision of the Supreme Court is supportable on the general principle of implied repeal, by the Central Legislature passing a law on a subject within its jurisdiction, which was inconsistent with an existing law on that subject. See NOTE 20 for a discussion of this general principle.

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[2] 1955 Bom 35 (37) (Pr 3) [(S) AIR V 42 C 8] : ILR (1955) Bom 49 (DB), *Basant Lal* v. *Bansilal*. (The additional words in no way restrict the competence of the Parliament.)

[3] *See* 1955 Bom 35 (37, 38) [(S) AIR V 42 C 8] : ILR (1955) Bom 49 (DB), *Basant Lal* v. *Bansilal*. (In this case the contention was raised that the new Central Act only extended the duration of the old Central Act which was a temporary Act. It was therefore argued that the new Act was only the same Act as before and the validity conferred by the assent under Cl. (2) to the repugnant State law, would continue unaffected by the new Central law — Contention was overruled and held that the new Central Law was not a mere *continuation* of the old law, repugnancy against which had been cured by assent under Cl. (2).)

[4] 1954 SC 752 (757) (Prs 7, 8, 9) [AIR V 41 C 174] : 1955 SCR 799 : 1954 Cri L Jour 1822 (SC).

[5] 1954 SC 752 [AIR V 41 C 174] : 1955 SCR 799 : 1954 Cri L Jour 1822 (SC), *Zaverbhai* v. *State of Bombay*.

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255. No Act of Parliament or of the Legislature of a State specified in Part A or Part B of the First Schedule, and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to that Act was given—

Requirements as to recommendations and previous sanctions to be regarded as matters of procedure only.

(*a*) where the recommendation required was that of the Governor, either by the Governor or by the President;

(*b*) where the recommendation required was that of the Rajpramukh, either by the Rajpramukh or by the President;

(*c*) where the recommendation or previous sanction required was that of the President, by the President.

GOVERNMENT OF INDIA ACT, 1935

"**109.** (2) No Act of the Federal Legislature or a Provincial Legislature, and no provision in any such Act, shall be invalid by reason only that some previous sanction or recommendation was not given, if assent to that Act was given —

(*a*) where the previous sanction or recommendation required was that of the Governor, either by the Governor, by the Governor-General, or by his Majesty;

(*b*) where the previous sanction or recommendation required was that of the Governor-General, either by Governor-General or by His Majesty."

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, Art. 255 shall be omitted. — The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISION

Recommendation of the President—For instance of such recommendation see Art. 274 (1).

1. **Scope of the article.**—This article corresponds to S. 109 of the Government of India Act, 1935. Where a State Act is published in the State Official Gazette with the notification that the assent of the President had been received, that is sufficient proof of the Act

having been reserved for and having obtained the President's assent.[1] Though a *Bill* of a State Legislature with respect to a matter in the Concurrent List and repugnant to an "existing law" with respect to that matter is not *reserved* for consideration of the President, it can still be validated by receiving the *subsequent* assent of the President under this article.[2]

CHAPTER II.—ADMINISTRATIVE RELATIONS

General

Obligation of States and the Union.

256. The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

GOVERNMENT OF INDIA ACT, 1935

"ADMINISTRATIVE RELATIONS BETWEEN FEDERATION, PROVINCES AND STATES

General

122. *(1)* The executive authority of every Province and Federated State shall be so exercised as to secure respect for the laws of the Federal Legislature which apply in that Province or State.

(2) The reference in sub-section (1) of this section to laws of the Federal Legislature shall, in relation to any Province, include a reference to any existing Indian law applying in that Province.

(3) Without prejudice to any of the other provisions of this Part of this Act, in the exercise of the executive authority of the Federation in any Province or Federated State regard shall be had to the interests of that Province or State."

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, Art. 256 shall be renumbered as clause (1) of that article, and the following new clause shall be added thereto, namely :

"(2) The State of Jammu and Kashmir shall so exercise its

Article 255 — Note 1

1. *See* 1953 Trav-Co 53 (55, 57) [AIR V 40 C 20] : ILR (1952) Trav-Co 605 (DB), *Sankaranarayana Panickar* v. *Narayana Panickar.*

2. *See* 1943 Nag 312 (313) [AIR V 30], *Balmukund* v. *Gadi Narayan.* (If the bill of Provincial Legislature regarding contracts is not reserved for consideration, it can still be validated by receiving the subsequent assent of Governor-General under S. 109 (2).)

executive power as to facilitate the discharge by the Union of its duties and responsibilities under the Constitution in relation to that State; and in particular, the said State shall, if so required by the Union, acquire or requisition property on behalf and at the expense of the Union, or if the property belongs to that State, transfer it to the Union on such terms as may be agreed, or in default of agreement, as may be determined, by an arbitrator appointed by the Chief Justice of India."

— The Constitution (Application to Jammu and Kashmir) Order 1954 (14-5-1954).

COGNATE PROVISIONS

Existing law—Interpretation of, see Art. 366 (10).

Failure to comply with or to give effect to directions given by the Union—Effect of—See Art. 365.

1. Scope of article.—The Indian Constitution does not follow the American Constitution on the question of the mutual relations between the Centre and the States. Under the American Constitution the Central laws are administered by a separate set of Courts and officers, so that side by side with State Courts and State Officers for the administration of State laws, there are Federal Courts and Federal officers for the administration of Federal laws. It has already been seen that the American Constitution also provides for a *double* citizenship, a citizenship of the State distinct from that of the Union, while the Indian Constitution recognises only one citizenship (ART. 5). So in the matter of the administration of laws also, the Indian Constitution has only one set of Courts and officers for the administration of all laws whether of the Centre or of the units.

This article makes it obligatory on the State Government to exercise its power in such a way as to ensure due compliance with all Union laws and 'existing laws' that may apply to the State. The article further empowers the Central Government to give directions to the State Governments for the above purposes. Non-compliance with such directions by any State will entitle the President to hold "that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution" (ART. 365) and this may entail the consequence of supersession of the State Government and assumption of President's rule under ART. 356.

For definition of "existing laws", see ART. 366, cl. (10).

Control of the Union over States in certain cases.

257. (1) The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

(2) The executive power of the Union shall also extend to the giving of directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance:

Provided that nothing in this clause shall be taken as restricting the power of Parliament to declare highways or waterways to be national highways or national waterways or the power of the Union with respect to the highways or waterways so declared or the power of the Union to construct and maintain means of communication as part of its functions with respect to naval, military and air force works.

(3) The executive power of the Union shall also extend to the giving of directions to a State as to the measures to be taken for the protection of the railways within the State.

(4) Where in carrying out any direction given to a State under clause (2) as to the construction or maintenance of any means of communication or under clause (3) as to the measures to be taken for the protection of any railway, costs have been incurred in excess of those which would have been incurred in the discharge of the normal duties of the State if such direction had not been given, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of the extra costs so incurred by the State.

GOVERNMENT OF INDIA ACT, 1935

"**126.** *(1)* The executive authority of every Province shall be so exercised as not to impede or prejudice the exercise of the executive authority of the Federation, and the executive authority of the

Federation shall extend to the giving of such directions to a Province as may appear to the Federal Government to be necessary for that purpose.

(2) The executive authority of the Federation shall also extend to the giving of directions to a Province as to the carrying into execution therein of any Act of the Federal Legislature which relates to a matter specified in Part II of the Concurrent Legislative List and authorises the giving of such directions :

Provided that a Bill or amendment which proposes to authorise the giving of any such directions as aforesaid shall not be introduced into or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

(3) The executive authority of the Federation shall also extend to the giving of directions to a Province as to the construction and maintenance of means of communication declared in the direction to be of military importance :

Provided that nothing in this sub-section shall be taken as restricting the power of the Federation to construct and maintain means of communication as part of its functions with respect to naval, military and air force works.

(4) If it appears to the Governor-General that in any Province effect has not been given to any directions given under this section the Governor-General, acting in his discretion, may issue as orders to the Governor of that Province either the directions previously given or those directions modified in such manner as the Governor-General thinks proper.

(5) Without prejudice to his powers under the last preceding sub-section, the Governor-General, acting in his discretion, may at any time issue orders to the Governor of a Province as to the manner in which the executive authority thereof is to be exercised for the purpose of preventing any grave menace to the peace or tranquillity of India or of any part thereof."

JAMMU AND KASHMIR

Article 257 applies to the State of Jammu and Kashmir—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Railways—Interpretation of, see Art. 366 (20).

Failure to comply with or to give effect to directions given by the Union—Effect of—See Art. 365.

1. Scope of the article.—Article 256 deals with the obligation of the State Government to exercise its power in such a way as to ensure compliance with Central laws and "existing laws". This article requires that the executive power of the State should be so exercised as not to interfere with the executive power of the Union.

and Union Government is given the power to issue such directions to the State Government as are considered necessary for the purpose.

Under ART. 73 the executive power of the Union extends to the matters with respect to which the Parliament has power to make laws and under ART. 162 executive power of the State extends to all matters with respect to which the Legislature of the State has power to make laws. But as a general rule, in Parts A and B States, executive power in regard to matters in the Concurrent List shall belong to the States (ART. 73 (1), Proviso). Thus, the executive power of the Union extends to the matters enumerated in LIST 1 (Union List), and residuary matters not covered by any of the Lists (ART. 248). The executive power of the State extends to matters enumerated in the State List (LIST 2) and the Concurrent List (List 3); but under this article the State Government even when exercising its powers in regard to the matters enumerated in LISTS 2 and 3 must see to it that the exercise of the executive power of the Union is in no way impeded or prejudiced, so that if there should be a clash between the two powers the State power will have to yield. The Union Government is also entitled to issue directions to the State Government for this purpose.

In addition to the above matters the Union Government is also entitled under this article to give directions to the State Government in regard to the matters mentioned in cls. (2) and (3). Clause (2) refers to directions that may be given in regard to the construction and maintenance of means of communications declared in the direction to be of national or military importance. Under LIST 2, Entry 13, communications are a State subject; notwithstanding this, cl. (2) of this article empowers the Union Government to declare certain means of communication as being of national or military importance and on such declaration issue directions to the State Government as to the construction and maintenance of such means of communication. The State Government, however, is entitled to be reimbursed the costs incurred by it in the construction and maintenance of such means of communication. (See cl. (4).)

Besides issuing directions to the State Government as to the construction and maintenance of communication declared to be of national and military importance the Union Government has also *direct* executive power in regard to highways and waterways declared as national highways and national waterways by Act of Parliament. The power of the Parliament in regard to this arises under LIST 1, Entries 23 and 24 and has been expressly saved by Proviso to clause (2).

Under LIST 1, Entry 4, naval, military and air force works are a Union responsibility and the construction and maintenance of means of communication as part of the functions in regard to such works are accordingly placed within the direct power of the Union by the Proviso to cl. (2).

Under LIST 1, Entry 22, railways are a Union subject but under LIST 2, Entry 2, police, including railway police, is a State subject. Clause (3) of this article enables the Union Government to issue directions to the State Government as to the measures to be taken for the protection of the railways within the State.

Thus, under ART. 256 and this article, the power of the Union Government to give directions to the State Government extends to the following four matters :

(1) The obligation of the State Government to so exercise its executive power as to ensure compliance with Central laws and existing laws;

(2) the exercise of the executive power of the Union without being impeded or prejudiced by the exercise of executive power by the State;

(3) the construction and maintenance of means of communication declared to be of national or military importance;

(4) measures of the protection for railways within the State.

Further, under ART. 353, where a Proclamation of Emergency has been made by the President under ART. 352, the Union Government can issue directions to the State Government. So also in such cases, Union officers may be authorised to exercise power in regard to matters *not* in the Union List.

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258. (1) Notwithstanding anything in this Constitution, the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends.

Power of the Union to confer powers, etc., on States in certain cases.

(2) A law made by Parliament which applies in any State may, notwithstanding that it relates to a matter with respect to which the Legislature of the State has no power to make laws, confer powers and impose duties, or authorise the conferring of powers and the imposition of duties, upon the State or officers and authorities thereof.

(3) Where by virtue of this article powers and duties have been conferred or imposed upon a State or officers or authorities thereof, there shall be paid

by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the State in connection with the exercise of those powers and duties.

GOVERNMENT OF INDIA ACT, 1935.

"**124.** *(1)* Notwithstanding anything in this Act, the Governor-General may, with the consent of the Government of a Province or the Ruler of a Federated State, entrust either conditionally or unconditionally to that Government or Ruler, or to their respective officers, functions in relation to any matter to which the executive authority of the Federation extends.

(2) An Act of the Federal Legislature may, notwithstanding that it relates to a matter with respect to which a Provincial Legislature has no power to make laws, confer powers and impose duties or authorise the conferring of powers and the imposition of duties upon a Province or officers and authorities thereof.

(3) An Act of the Federal Legislature which extends to a Federated State may confer powers and impose duties or authorise the conferring of powers and the imposition of duties upon the State or officers and authorities thereof to be designated for the purpose by the Ruler.

(4) Where by virtue of this section powers and duties have been conferred or imposed upon a Province or Federated State or officers or authorities thereof, there shall be paid by the Federation to the Province or State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the Province or State in connection with the exercise of those powers and duties."

JAMMU AND KASHMIR

Article 258 applies to the State of Jammu and Kashmir—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

1. Scope of the article. — This article gives effect to the principle adopted in this Constitution that there should be no water-tight separation between Union and State authorities in administrative matters as under the American Constitution. The article empowers the Union Government to delegate its functions to the State Government or to the officers of the State Government with the consent of the State Government. The word "functions" in cl. (1) does not refer exclusively to the functions of a strictly executive nature such as the carrying out of laws. The word is wide enough to include such functions as subordinate legislation which Union Government may have under the law.[1]

Apart from the power of the Union Government to delegate its functions under the law to State authorities, it is also open to the Parliament, while making a law, to provide for the conferring of powers and imposition of duties under such law upon the State Government or State authorities, notwithstanding that such powers and duties may relate to matters with respect to which the State Legislature has no power to make laws. Thus, in *Raghubar Singh v. Emperor*[2] which was a case under the corresponding S. 124 (2) of the Government of India Act, 1935, it was held that there was nothing *ultra vires* in the Advocate-General of a Province being specified in the Insurance Act, 1938, S. 107, as the person to control the initiation of proceedings under the Act. (See also Notes on ART. 73.)

Armed Forces in States in Part B of the First Schedule.

259. (1) Notwithstanding anything in this Constitution, a State specified in Part B of the First Schedule having any Armed Forces immediately before the commencement of this Constitution may, until Parliament by law otherwise provides, continue to maintain the said Forces after such commencement subject to such general or special orders as the President may from time to time issue in that behalf.

(2) Any such Armed Forces as are referred to in clause (1) shall form part of the Armed Forces of the Union.

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, ART. 259 shall be omitted.—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS.

"Commencement of this Constitution" — Meaning of — This Constitution came into force on 26-1-1950—See Art. 394.

Article 258 — Note 1

[1] 1950 All 423 (426, 427) (Pr 21) [AIR V 37 C 161] : ILR (1952) 2 All 310 : 51 Cri L Jour 1144 (DB), *Amir Khan v. State.*
[*See* 1946 Pat 196 (198) [AIR V 33 C 81] : ILR 24 Pat 699 : 48 Cri L Jour 40 (DB), *Hadibandhu Padhari v. Emperor.* (Government of India, by a notification under S. 124 (1), has entrusted all Provincial Governments with the functions of the Central Government under certain sections of the Extradition Act, including S. 8-A. — Objection that the functions were of a *judicial* and not *executive* character was overruled.)]

[2] 1944 FC 25 (29) [AIR V 31] : 46 Cri L Jour 332 (FC).

"State specified in Part B of Sch. I"—The States so specified are Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Patiala and East Punjab States Union, Rajasthan, Saurashtra, Travancore-Cochin.

Jurisdiction of the Union in relation to territories outside India.

260. The Government of India may by agreement with the Government of any territory not being part of the territory of India undertake any executive, legislative or judicial functions vested in the Government of such territory, but every such agreement shall be subject to, and governed by, any law relating to the exercise of foreign jurisdiction for the time being in force.

JAMMU AND KASHMIR

Article 260 applies to the State of Jammu and Kashmir — The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISION

"Undertake any executive, legislative or judicial functions" — This can be done under the Extra-Provincial Jurisdiction Act, 1947 (47 of 1947).

1. "Foreign jurisdiction."—Under LIST 1, Entry 16, Parliament has power to make laws with respect to "foreign jurisdiction," that is jurisdiction which a State exercises over the territory of another State under certain circumstances.

The Extra-Provincial Jurisdiction Act (47 of 1947), is a "law relating to the exercise of foreign jurisdiction" and by virtue of ART. 372 continues in force after the commencement of the present Constitution also.[1] [The Act is now known as the Foreign Jurisdiction Act, its title having been so changed by the Adaptation of Laws Order (1950).] See also the undermentioned case.[2]

Article 230 — Note 1

[1] 1953 Cal 363 (364) [AIR V 40 C 135], *Manmull* v. *N. C. Putatunda*.

[2] 1954 Punj 37 (39, 40) (Prs 13, 15, 16, 17) [AIR V 41 C 21] : 1954 Cri L Jour 302 : ILR (1954) Punj 649 (DB), *Gudder Singh* v. *State*. (Where persons who were British Indian subjects and after the partition became subjects of the Indian Dominion, commit an offence at a place without and beyond the limits of the Provinces but which place was according to agreement with India and the foreign country administered by Indian Government, the Courts in India have jurisdiction to try such offence as if it had been committed within the Provinces of India. This is so even in the absence of any notification under S. 4 of the Extra Provincial Jurisdiction Act XVII of 1947.

Public acts, records and judicial proceedings.

261. (1) Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State.

(2) The manner in which and the conditions under which the acts, records and proceedings referred to in clause (1) shall be proved and the effect thereof determined shall be as provided by law made by Parliament.

(3) Final judgments or orders delivered or passed by civil courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law.

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in clause (2) of ART. 261, the words "made by Parliament" shall be omitted — The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

Synopsis

1. Analogous law.
    - (a) United States of America.
    - (b) Australia.
2. Scope of the article.

2a. Retrospective effect of article.

3. Clause (2).

Where a territory by agreement between India and Pakistan to which the territory belongs remains within the administrative jurisdiction of India one of the principles of international law is that a State in possession must maintain a certain order in the territory of which it is in possession.

If the possession of a territory which acceded to another State remains in the possession of the ceding State, the laws which were originally in force would still be in force and can be enforced by the State in possession. Revenue laws of the ceded territory are not affected by the change of territory. In whichever way it may be looked at, whether the territory had become Pakistan territory and by consent of the parties it remained in possession of India or after the cession of the territory to Pakistan it remained in possession of India, according to the international law the right of India as a State to maintain order and safeguard economic conditions remained in that State (India) unimpaired.

And even if the territory has been absorbed by India the position in international law is that there is a genuine succession with regard to the fiscal property and fiscal funds of the extinct State. They both accrue to the absorbing State *ipso facto* by the absorption of the extinct State).

4. Clause (3) :
    - (a) General.
    - (b) Pre-Constitution judgments and decrees.
5. Jammu and Kashmir.

(a) United States of America.

1. Analogous law.

(a) United States of America.

Article IV, SEC. 1 of the American Constitution reads as follows :

> "Section 1 : Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

(b) Australia.

(b) Australia.

Section 118 of the Commonwealth of Australia Constitution Act provides as follows :

> "**118.** Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public acts and records, and the judicial proceedings of every State."

2. Scope of the article. — Under ART. 1, India is a Union of States. In other words, the component parts of the Indian Union are not mere administrative units, but political entities, each with its own independent government, although there are several features which ensure co-ordination and cohesion between the different units and also the supremacy, actual as well as potential, of the Centre over the units. (See ART. 1, NOTE 3.) Therefore, in a sense, India constitutes an aggregate of independent jurisdictions, and their relations *inter se* do not stand on the same footing as the purely domestic affairs of a State. In other words, the analogy of foreign States is not absolutely inapplicable to the mutual relations between the States composing the Union.[1] But, at the same time, it is clear that the States do not constitute "foreign States" *vis-a-vis* each other. In ART. 367, cl. (3), "foreign State" has been defined as meaning "any State other than India." But in view of the fact that in spite of the different States being linked up under a common sovereignty and authority, they are still separate political entities, though not for international purposes, at any rate for the internal purpose of the Union, some provision in the Constitution ensuring that the States

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Article 261 — Note 2

[1] 1954 Trav.-Co. 358 (360) (Prs 9, 10) [AIR V 41 C 122] : ILR (1954) Trav-Co 694 (FB), *Vareed* v. *Gopalbai.* (In a federation, for all *national* purposes embraced by the federal Constitution, the State is of course one united under the same sovereign and authority and governed by the same laws. But in other respects, the States are necessarily foreign to and independent of each other and a foreign judgment for purposes of private international law need not necessarily be of a State owing a different allegiance.)

do not treat each other as foreign States but implement and recognize their common membership of a single composite State has been considered necessary and desirable and has been enacted in this article. As seen in Note 1, there are analogous provisions under other federal constitutions like America and Australia.

Comparing the article with the analogous provision in Art. IV, Sect. 1 of the American Constitution, it will be seen that cls. (1) and (2) are substantially the same as the American provision and cl. (3) is new. Under the American Constitution, accordingly, the final judgments of Courts of other States are not directly executable, but can only be made the basis of a suit on judgment. But this article makes it clear that the decrees of courts in one State are capable of being *executed* through the courts of another State without the necessity of a suit upon the judgment. See further, Note 4.

As in the American Constitution, there are two parts, in this provision, of what may be called the full faith and credit clause. Clause (1) contains the basic principle of full faith and credit being given by each State to public acts, records and judicial proceedings of the Union and every other State in the Republic. Clause (2), corresponding to the second part of Art. IV, Sect. 1 of the American Constitution, deals with the question of authenticity and effect of the public acts, records and judicial proceedings. In other words, how it is to be proved in a court of law that a certain matter is a public act or a public record or judicial proceeding of a State is left to the Legislature to decide. Similarly, the question as to what effect is to be given to such public acts, records and judicial proceedings is a matter for the Legislature. This is the effect of cl. (2). What cl. (1) guarantees is that once a matter is proved to be a public act, record or judicial proceeding of a State, the things that are stated, asserted or declared therein or are determined thereby must be accepted as conclusive and beyond question. In other words, such public acts, records and judicial proceedings of a State are not open to examination on merits. The question of their authenticity and proof and of their effect are, as stated already, a different matter which has been left to the Legislature to determine. This is also the effect of the law as expounded under the American Constitution as contained in Art. IV, Sect. 1, above referred to.[2] Neither cl. (1) nor cl. (2) purports to give any efficacy to a proceeding or judgment rendered in a former Indian State or the present States. They only deal with the question of proof.[2a] That the full faith and credit clause by itself does not connote any particular legal effect as appertaining to a certain matter is also shown by the fact that, as already stated, under the American Constitution notwithstanding the full faith and credit clause, judgments of the courts in one State are not *ipso facto* executable in another State but can only furnish the cause of action for a suit on judgment in which suit, however, the correctness of the judgment on merits cannot be re-examined but must be accepted as final and conclusive.[3]

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[2] (1839) 13 Pet 312 (327, 328) : 10 Law Ed 177, *M'Elmoyle* v. *Cohen.*
(1888) 127 US 265 (291, 292) : 32 Law Ed 239, *State of Wisconsin* v. *Pelican Ins. Co. of New Orleans.*
(1878) 24 Law Ed 959 (962) : 97 US 331, *Mutual Life Ins. Co.* v. *Harris*
(1873) 85 US 897 (899, 901, 902) : 18 Wall 457, *Thompson* v. *Whitman.*

[2a] 1955 Nag 236 (237) (Pr 5) [AIR V 42 C 60] : ILR (1955) Nag 613 : 1955 Cri L Jour 1275 (DB), *Govind Kesheo* v. *State of M. P.* (Judgment

The expression "full faith and credit" denotes such faith and credit as the public acts, records and judicial proceedings have by law or usage in the particular State to which they belong.[4] No greater effect will be given to a judgment or a statute of another State than is given in such State.[5] Hence, there is no bar to the questioning of the jurisdiction or the *vires* of the public act or judicial proceeding of another State.[6] Moreover, the public acts, records and judicial proceedings to which the article refers are obviously valid and not void acts, records and proceedings.[7]

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of a *criminal court in* Hyderabad passed before 26-1-1950 — Article does not apply for the purpose of giving any legal efficacy to such judgment —Cl. (3) applies only to judgments and orders of civil courts).

[3] *See* (1888) 127 U.S. 235 (291, 292) : 32 Law Ed. 239, *State of Wisconsin* v. *Pelican Insurance Co. of New Orleans.* (Art. 4, S. 1 of the U. S. Constitution and Act of Congress, establish a rule of evidence rather than of jurisdiction. While they make the record of the judgment rendered after due notice in one State conclusive evidence in the courts of another State or of the U. S. of the matter adjudged, they do not affect the jurisdiction either of the court by which it was rendered or of the courts in which it is offered in evidence).

[4] (1909) 53 Law Ed. 892 (897) : 214 U. S. 19 (28, 29), *Smithsonian Institution* v. *St. John.*
(1928) 72 Law Ed. 365 (368) : 275 U. S. 449 (451), *Roche* v. *McDonald.*
(1915) 237 U. S. 531 (545) : 59 Law Ed. 1089, *Royal Arcanum v. Green.*
(1888) 127 U. S. 265 (291, 292) : 32 Law Ed. 239, *State of Wisconsin* v. *Pelican Insurance Co. of New Orleans.*
(1887) 30 Law Ed. 519 (522) : 119 U. S. 622, *Chicago and Alton R. R. Co. v. Wiggins Ferry Co.*
(1885) 29 Law Ed. 535 (537) : 116 U. S. 1 (5), *Hanley* v. *Donoghue.*

[5] (1933) 77 Law Ed. 1307 (1310) : 289 U. S. 439 (443), *Ohio* v. *Chattanooga Boiler & Tank Co.*

[6] (1919) 63 Law Ed. 250 (253) : 248 U. S. 289 (293), *Flexner* v. *Farson.*
(1873) 85 U. S. 897 (899, 901, 902) : 18 Wall 457, *Thompson v. Whitman.*
(1850) 13 Law Ed. 648 (352, 653) : 11 How 165 (174, 175, 176), *D'Arcy* v. *Ketchum.*
[*See* 1925 Cal 955 (956) [AIR V 12] (DB), *Panchkari* v. *Girdharimal Mohesri.* (Case under C. P. C., S. 13).

[7] 1953 Trav-Co 392 (394) (Pr 10) [AIR V 40 C 155], *Venkitaraman* v. *Central Road Traffic Board.* (Art. 261 (1) applies only to acts which are valid and good and not to those that are void. Thus, where a

In America, every State has got its own constitution and the duty to give full force and effect to the constitution of another State is as obligatory as the similar duty in respect to the judicial proceedings of that State. But where the validity of a statute of another State is questioned as being *ultra vires* the constitution of that State, and the validity of the statute is upheld, there is no question of not giving full faith and credit to the constitution of the other State.[8]

The expression "public acts" will obviously include the statutes passed by the Legislature of a State.[9]

As regards "public records" it is conceived that public documents as defined in S. 74 of the Evidence Act and "public records" under S. 35 of the same Act would be "public records" for the purpose of this article.

2a. Retrospective effect of article. — This article deals with the state of affairs which would arise after the commencement of the Constitution.[1] See also NOTE 4 (b).

3. Clause (2).—This clause corresponds to the second part of SECT. 1, ART. IV of the American Constitution. As seen in NOTE 2, the mere fact that full faith and credit should be given to a certain act, record or proceeding does not dispense with the proof of such act,

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permit issued to ply a motor vehicle on a public route is really not a permit at all as its grant was ultra vires its grantor its issue cannot be "an act" within the meaning of Article 261 of the Constitution.)

[8] (1909) 214 U. S. 19 (28, 29) : 53 Law Ed. 892, *Smithsonian Institution* v. *St. John.*

[9] (1896) 162 U. S. 547 (562) : 40 Law Ed. 1069, *Harwood* v. *Wentworth.* (A territorial statute officially attested by the presiding officers of the territorial council and house of representatives, when approved by the governor and committed to the custody of the secretary of the territory, cannot be impeached by legislative journals which the fundamental laws of the territory do not require to show everything done in both branches of the legislature while engaged in the consideration of the Bills).

[*See* 1955 SC 661 (722) [AIR V 42 C 101] : 1955-2 SCR 303 (SC), *Bengal Immunity Co.* v. *State of Bihar.* (*Venkatarama Ayyar, J.*: "The territory of one State is not a foreign territory in respect of another State........ I think it is permissible to suggest that........ any taxing power vested in an individual State must carry with it the incidental implication of enforceability, if need be, in any other State within the Union, when the very nature of that tax, as contemplated by the Constitution, involves it. In this context Art. 261 (1) may well be relied upon to justify such a view. I am aware that this has been generally taken as applicable to judicial and legislative proceedings. But the language of the Article is capable of wider application".)]

Article 261 — Note 2a

[1] 1955 Nag 236 (237) (Pr 5) [AIR V 42 C 60] : ILR (1955) Nag 613 : 1955 Cri L Jour 1275 (DB), *Govind Kesheo* v. *State of M. P.* (Neither cl. (1) nor cl. (2) purports to give any efficacy to any proceeding or judgment rendered in a former Indian State or the present States.)

record or proceeding. Nor does it by itself indicate what legal effect such act, record or proceeding must have. These two questions are left, as under the American Constitution, to the Union Legislature. The question has arisen under the American Constitution whether the full faith and credit clause will come into operation in the absence of legislation by the Congress as to the mode of proof and effect of the public acts, records and judicial proceedings. The general trend of opinion is that the full faith and credit clause is a self-executing provision, not dependent for its operativeness on legislation by the Congress.[1] It is conceived that the same will be the position under the Indian Constitution. Moreover, under ART. 372 all existing laws continue in force, and so far as the mode of proof of public acts, records and judicial proceedings is concerned, it is already covered by the provisions of the Evidence Act, and there is nothing to indicate that these provisions will cease to be in force. No doubt, under ART. 372, cl. (1) it is stated that "all the laws in force in the territory of India shall continue in force subject to the other provisions of the Constitution." But cl. (2) of this article is not sufficiently specific so as to lead to the conclusion that the provisions of the Evidence Act, in so far as they bear on the mode of proof of public acts, records and judicial proceedings, are abrogated.

Under cl. (2) of this article, the power of providing by law as to the mode of proof and effect of public acts, records and judicial proceedings of the Union and of the several States has been given to the Parliament. But LIST 3 (Concurrent List), Entry 12 reads "Evidence and oaths; recognition of laws, public acts, records and judicial proceedings." Under ART. 246, both the Parliament and the State Legislatures have power to make laws on matters in the Concurrent List. But under ART. 245 the legislative power of the Parliament as well as of the State Legislatures is subject to the other provisions of the Constitution. Hence, in view of the express provision in cl. (2) of this article in so far as the public acts, records and judicial proceedings of the Union and of the States of India are concerned, it must be held that, notwithstanding ART. 246 read with LIST 3, Entry 12, it is only the Parliament that has the law-making power. The powers of the State Legislatures under LIST 3, Entry 12 would, therefore, seem in this respect to be limited to legislating about the proof and recognition of laws, public acts, records and judicial proceedings of foreign States.

(a) General.

4. Clause (3). — Under S. 13 of the Civil Procedure Code, foreign judgments are conclusive as to the matters decided by them, as between the parties to the judgments. But foreign judgments are

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Article 261 — Note 3

[1] *See* Willis on Constitutional Law of the United States, 1936 P. 460.

not directly executable in India, but only furnish a cause of action for a suit on judgment.

Under ART. 367, cl. (3), "foreign State" means any State other than India, and under the definition of a "foreign Court" in SEC. 2 (5) of the Civil Procedure Code, as amended by Act 2 of 1951, a foreign Court means a Court situate outside India, and not established or continued by the authority of the Central Government. Thus, it is clear that as among the States composing the Indian Union, they are not foreign States *vis-a-vis* each other nor are the judgments and decrees of the civil Courts of one State, "foreign judgments" in other States.

Accordingly, under the provisions of the Civil Procedure Code, S. 39, a decree, passed by the courts in one State in India, can be transferred for execution to a Court in another State and under S. 40 it is expressly provided that where a decree is sent for execution in another State, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that State. Thus, so far as the Civil Procedure Code is concerned, the position is clear that the decrees passed by civil Courts in one State in India can be transferred for execution to Courts in another State.[1]

The provision in cl. (3) of this article provides, so to say, the constitutional charter for the provisions in the Code of Civil Procedure.

It has been seen in NOTE 2 that in spite of the full faith and credit clause in the American Constitution, the decrees of Courts of one State in America are not directly *executable* by the Courts of another State. The position accorded to the judgments of Courts in other States under the American Constitution is not different from the position given to foreign judgments under S. 13 of the Civil Procedure Code. But under the Indian Constitution the full faith and credit clause is reinforced by the provision in cl. (3), making the judgments of the civil Courts in one State directly executable through the Courts of another State.

As to what constitutes the territory of India, see ART. 1, cl. (3), according to which such territory shall comprise the territories of the States specified in Parts A, B and C of the First Schedule, the territories specified in Part D of the First Schedule and such other territories as may be acquired.

It must be noted that cl. (3) only refers to the final judgments

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Article 261 — Note 4

[1] But the Code does not apply to State of Jammu and Kashmir, State of Manipur, the Tribal Areas in the State of Assam and save as otherwise provided in the Act 2 of 1951, S. 1(3), the Scheduled Areas in the State of Madras.

and orders passed by *civil Courts*.[2] In this connection, the general principle must be recalled that the Courts of no country execute the penal laws of another.[3]

The judgments are stated to be capable of execution "according to law." The expression "according to law" refers to the law in force in the State where execution is sought.[4] If the decree is barred by limitation according to the law in force in such Court, then the decree cannot be executed there.[5] It is a general principle of private international law that all matters of procedure are governed by the *lex fori* or the law of the forum in which the action is brought. Questions of limitation are essentially matters relating to procedure.[6]

The question arises whether cl. (3) is a self-executing provision, that is, whether even in the absence of a law providing for the execution of the decree of a Court in another State, such decree should be capable of execution outside the State wherein it has been passed. For instance, the Code of Civil Procedure does not apply to the State of Jammu and Kashmir and to the State of Manipur, so that the provisions of the Code relating to the transfer of decrees passed by the Courts of one State for execution in another State cannot be relied upon in the case of the above States, whether the decree to be executed is a decree passed in such States or in any other State to which the Code may apply. Hence, in such cases the question arises whether by relying purely on cl. (3) of this article, execution can be sought in the State of Jammu and Kashmir or in the State of Manipur in respect of a decree passed in some other State of the Indian Union, say, Madhya Pradesh, and *vice versa*. To this question, an affirmative answer seems to flow from a Full Bench decision of the Hyderabad High Court in *Ram Dayal* v. *Shankar Lal*.[7] In that case, a Court of Akola in Madhya Pradesh sought the assistance of a Court in Aurangabad in Hyderabad State in an insolvency matter and it was held that in spite of the absence of specific provision in the Hyderabad Insolvency Act, the Aurangabad Court should act on the underlying principle of S. 80 of that Act and render the aid asked for.

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[2] 1955 Nag 236 (237) (Pr 5) [AIR V 42 C 60] : ILR (1955) Nag 313 : 1955 Cri L Jour 1275 (DB), *Govind Kesheo* v. *State of M. P.*

[3] (1888) 32 Law Ed 239 (243) : 127 US 265 (290, 291), *Wisconsin* v. *Pelican Insurance Co. of New Orleans.*

[4] 1954 Sau 123 (127) (Pr 14) [AIR V 41 C 53] (FB), *Gokaldas Naranji* v. *Dwarkadas Jethabhai.*

1952 Hyd 80 (91) (Pr 33) [AIR V 39 C 43] : ILR (1952) Hyd 196 (FB), *Ramdayal* v. *Shankarlal.*

1952 Sau 90 (91) (Pr 5) [AIR V 39] (FB), *Dwarkadas Jethabhai* v. *Gokaldas Naranji.*

[5] 1954 Sau 123 (127) (Prs 14, 16) [AIR V 41 C 53] (FB), *Gokaldas Naranji* v. *Dwarkadas Jethabhai.*

[6] 1916 Bom 200 (201, 202) [AIR V 3] (DB), *Nabibhai Vazirbhai* v. *Dayabhai Amulakh.*

(1839) 13 Pet 312 (327, 328) : 10 Law Ed 177, *M'Elmoyle* v. *Cochen.*

See also AIR Commentary on Limitation Act, S. 11.

[7] 1952 Hyd 80 (84, 85) (Pr 9) [AIR V 39 C 43] : ILR (1952) Hyd 196 (FB),

A similar conclusion is also indicated by the undermentioned Full Bench decision[8] of the High Court of Jammu and Kashmir. In that case it was held that the definition of 'foreign Court' in Jammu and Kashmir Civil Procedure Code before amendment of 2011 Bk. must be held subservient to the provisions in the Constitution of India, namely, ART. 5, conferring on the State subjects, the citizenship of India and cl. (3) of ART. 261 and that to the extent of the repugnancy to the above provisions of the Constitution, the definition in the Jammu and Kashmir Civil Procedure Code was void. It was accordingly held that an *ex parte* decree passed by the Amritsar Court after 26-1-1950 against a subject of Jammu and Kashmir was executable by the Courts of Jammu and Kashmir under cl. (3) of this article, notwithstanding the provisions of the Jammu and Kashmir Civil Procedure Code in force at the time.

In *Dwarkadas Jethabhai* v. *Gokaldas Naranji*[9] Baxi, J., with whom the other Judges concurred, observed as follows :

> "Under this article (Art. 261, cl. (3)), decrees of the Bombay High Court became no doubt executable in the territory of the Saurashtra State. But they could be executed only according to the law of the Saurashtra State. If that law provides a certain procedure, for enforcing it, it is the duty of the decree-holder to obtain enforcement by adopting that procedure and not otherwise. He cannot insist that his decree should be executed by means of an application if under the law it is not the appropriate remedy."

It is submitted with respect that the words "capable of execution" in this clause only contemplate execution by *application*, and enforcement by *suit* on judgment would not be *execution* of the judgment and it would be a wrong use of words to say that a judgment which is only capable of enforcement by a suit on judgment is "capable of execution." The clause distinctly contemplates a higher position for judgments of Courts of other States of the Union than what is allowed to foreign judgments under S. 13 of the Civil Procedure Code and it would be nullifying the provisions of the clause to hold that even enforceability by suit is covered by the expression "capable of execution."

(b) Pre-Constitution judgments and decrees.

Before amalgamation of all parts of the country into one Federation and under one Constitution, British India and the Indian States were, in relation to each other, in the position of foreign

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[8] 1955 J & K 5 (6, 7) [(S) AIR V 42 C 2] (FB), *Murari Lal* v. *Firm Bhagwan Das.*

[9] 1952 Sau 90 (91) (Pr 5) [AIR V 39] (FB).

States. Hence, judgments rendered in Indian States were foreign judgments in British India and *vice versa.*[10] This position has now completely changed and judgments of courts in those parts of the country which were originally territories of Indian States, (e. g. Part B States) will no longer be regarded as foreign decrees in those parts of the territories which were formerly British India, and *vice versa.*[11]

The question has, however, arisen about the applicability of this clause to cases in which it is sought to execute in a Part A State (representing what was previously British India) a final judgment of a Court in an Indian State passed before the coming into force of the Constitution. The converse question has also arisen, namely, as to the executability of a decree passed by a Court in British India before the coming into force of the Constitution, through a Court in a part of the country which was previously an Indian State.

The position as to the above question has to be considered with reference to two distinct classes of cases :

(i) those in which the validity of the judgment is not attacked as being without jurisdiction under private international law ; and

(ii) those in which the judgment is impugned as being without jurisdiction under private international law.

It has already been stated above that in the pre-Constitution period, Indian States and British India were in relation to each other in the position of foreign States, and their judgments were also foreign judgments in each other's territory. In regard to such judgments, it is an established principle of private international law that a judgment *in personam* against a non-resident foreigner who has not submitted to the jurisdiction of the Court is one without jurisdiction.[12]

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[10] ('91) ILR 15 Bom 216 (219), *Haji Musa Haji Ahmed* v. *Parmanand Nursey.*

('84) ILR 22 Cal 222 (237) (PC), *Gurdyal Singh* v. *Rajah of Faridkot.*

[*See* 1955 J & K 5 (5) [(S) AIR V 42 C 2] (FB), *Murari Lal* v. *Firm Bhagwan Das.* (It is pointed out in this case that notwithstanding reciprocal arrangement between British India and a Native State for execution of each other's decrees in each other's territory, an ex parte decree passed by a British Indian Court against a non-resident subject of the Native State who had not submitted to the jurisdiction of the British Indian Court was a nullity under the P. C. ruling in *Gurdyal Singh* v. *Rajah of Faridkot,* ('84) ILR 22 Cal 222 (PC) and could not be executed in the Native State under the reciprocal arrangement for execution of decrees.)

[11] 1955 J & K 5 (5) [(S) AIR V 42 C 2] (FB), *Murari Lal* v. *Firm Bhagwan Das.* (Ex parte decree passed by Amritsar Court against subject of Jammu and Kashmir can be executed by Court in Jammu and Kashmir.)

[12] ('84) ILR 22 Cal 222 (237) (PC), *Gurdyal Singh* v. *Rajah of Faridkot.*

Where the foreigner is a resident within jurisdiction or has submitted to the jurisdiction of the Court or otherwise the judgment is not open to impeachment on the ground of want of jurisdiction under private international law, it would seem that such judgments would be capable of execution throughout the territory of India, although it might have been passed by a Court in what was previously an Indian State and its execution is sought in a Court in a territory which was previously British India, and *vice versa*.[13]

But this position must be held to emerge from the Code of Civil Procedure as amended by Act 2 of 1951, and not from this clause, inasmuch as under the ruling of the Supreme Court in *Janardhan Reddy* v. *State of Hyderabad*[14] decrees and judgments, passed prior to the coming into force of the Constitution, cannot be treated as passed by Courts in the "territory of India" as defined by this Constitution.[15]

As regards the Code of Civil Procedure also, it has been held in some decisions[16] that S. 20 (b) of the Amendment Act 2 of 1951 will come in the way of holding that the decrees are capable of execution in other States in such cases. But it is submitted that this view is not correct and that having a decree enforced by execution instead of by a suit on judgment is a purely procedural matter and does not affect any "right, privilege obligation or liability," within the meaning of that clause.[17]

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[13] *See* 1952 Hyd 80 (90) (Pr 29) [AIR V 39 C 43] : ILR (1952) Hyd 193 (209) (FB), *Ramdayal* v. *Shankarlal.* (Aurangabad Court in Hyderabad State held to act in aid of Akola Court in Madhya Pradesh in an insolvency matter before latter Court—The order of the Akola Court requisitioning such aid was one passed before the Constitution).

[14] 1951 SC 124 (127) (Pr 7) [AIR V 38 C 19] : 52 Cri L Jour 391 : 1950 SCR 940 (SC).

[*See also* 1951 SC 128 (130) (Pr 7) [AIR V 38 C 20] : 1951 SCR 228 : ILR (1951) Hyd 294 : 52 Cri L Jour 860 (SC), *Keshavan* v. *State of Bombay.* (Art. 13(1) of the Constitution not retrospective).

[15] 1955 Madh-B 1 (13) (Pr 44) [(S) AIR V 42 C 1] (FB), *Brajmohan v. Kishorilal.*

1954 Sau 123 (125) (Pr 6) [AIR V 41 C 53] (FB), *Gokaldas Naranji* v. *Dwarkadas Jethabhai.*

[*See however* 1953 Hyd 19 (19) (Pr 4) [AIR V 40 C 11] : ILR (1952) Hyd 1030 (DB), *Dyna Craft Machine Co.* v. *Syed Jahangir Ali.* (In this case cl. (3) of this Article is held to apply to a pre-Constitution decree.)

[16] 1954 Sau 123 (126) (Pr 16) [AIR V 41 C 53] (FB), *Gokaldas Naranji* v. *Dwarkadas Jethabhai.*

1954 Trav-Co 358 (361) (Pr 14) [AIR V 41 C 122] : ILR (1954) Trav-Co 694 (FB), *Varred* v. *Gopalbai.*

[17] 1953 Madh-B 225 (229) (Pr 65) [AIR V 40 C 85] : ILR (1953) Madh-B 312 (DB), *Firm Lunaji* v. *Purshottam.*

[*See* 1955 Madh-B 1 (13) (Pr 43) [(S) AIR V 42 C 1] (FB), *Brajmohan* v. *Kishorilal*].

As regards cases in which the validity of a pre-Constitution judgment is open to impeachment as having been without jurisdiction under private international law at the time it was rendered, there is a conflict of decisions as to whether the subsequent unification of the country and the fact that at the time when execution is sought the territories in which judgment was rendered and execution is applied for are no longer in the position of foreign States to each other, will remove the objection as to want of jurisdiction under international law and render the judgments capable of execution. According to the High Courts of Bombay,[18] Madhya Bharat,[19] Hyderabad[20] and Rajasthan,[21] a personal decree passed against a non-resident foreigner who has not submitted to jurisdiction is not an absolute nullity and is open to question only under international law. In other words, such a decree can only be questioned for want of jurisdiction when a suit is brought as on a foreign judgment. But under the municipal law of the very country in which such a decree has been passed against a foreigner, the decree will not be invalid if according to that law the Court which passed it had jurisdiction. As under S. 20 (c) of the Code of Civil Procedure, mere cause of action without residence of the defendant furnishes jurisdiction, the decree passed against a non-resident and non-submitting foreigner by a Court at a place where the cause of action wholly or partly arises is not therefore one without jurisdiction as regards the territories governed by the Civil Procedure Code.[22] Hence, where no question of applying private international law arises owing to the concerned territories having ceased to be foreign States *vis-a-vis* each other, the original defect from the point of view of private international law ceases to exist and decrees become executable as those of the same State.[23] An opposite view has, however, been taken by the High Courts of Mysore,[24] Nagpur,[25] Calcutta[26] and Travancore-

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[18] 1951 Bom 125 (126) (Pr 6) [AIR V 38 C 24] : ILR (1952) Bom 65 (FB), *Bhagwan* v. *Rajaram*.

1951 Bom 190 (195, 193) (Prs 14, 15, 16) [AIR V 38 C 39] : ILR (1950) Bom 640 (DB), *Chunnilal* v. *Dundappa*.

[19] 1955 Madh-B 1 (13) (Pr 43) [(S) AIR V 42 C 1] (FB), *Brajmohan* v. *Kishorilal*.

1953 Madh-B 225 (227, 228) (Pr 32) [AIR V 40 C 85] : ILR (1953) Madh-B 312 (DB), *Firm Lunaji* v. *Purshottam*.

[20] 1955 Hyd 184 (Pr 6) [(S) AIR V 42 C 50] : ILR (1955) Hyd 464 (DB), *Meherunnissa Begum* v. *Venkat Murli*. (A personal *ex parte* decree passed in 1946 by the Chanda Court in Central Provinces against a resident of Hyderabad State who did not enter appearance, in respect of a cause of action arising within the jurisdiction of that Court, is not null and void. The mere fact that it cannot be enforced in any other Court would not make it nullity.

According to the Civil Procedure Code prevalent then, the decree-holder could not directly execute the decree in the Courts of the Hyderabad State and had to file a regular suit on the basis of the foreign decree under S. 8, Hyderabad Civil P. C., but before the decree-holder could take such a step the Constitution came into force. After the coming into force of the Constitution, the Chanda Court ceased to be a foreign Court and its decrees are capable of execution as any other decree passed by Hyderabad Court under Art. 261(3) of the Constitution).

1953 Hyd 19 (19, 20) (Prs 4, 5-6) [AIR V 40 C 11] : ILR (1952) Hyd 1030 (DB), *Dyna Craft Machine Co.* v. *Syed Jahangir*.

[21] 1953 Raj 204 (208) (Pr 11) [AIR V 40 C 73] : ILR (1953) Raj 449 (FB), *Radheyshiam* v. *Firm Sawai Modi Basdeo Prasad*. (After merger of former States of Jaipur and Dholpur in the State of Rajasthan, decree passed by Civil Judge of Jaipur on 24-3-1947 before merger which was a personal decree against the judgment-debtor who was a subject of the then Dholpur State and who had not submitted to the jurisdiction of the then Jaipur State is executable within the territories of the former Dholpur State).

[*But see* 1954 Raj 4 (10) (Pr 25) [AIR V 41 C 3] : ILR (1953) 3 Raj 505 (DB), *Premchand* v. *Danmal*. (In this case, the previous Full Bench decision of the same Court in AIR 1953 Raj 204 was apparently not brought to the notice of the Division Bench.)]

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[22] ('03) ILR 26 Mad 544 (552) : 30 Ind App 220 (PC), *Annamalai Chetty* v. *Murugasa Chetty.* (Where the cause of action against a non-resident foreigner arises within jurisdiction that, in itself, is sufficient ground of jurisdiction).

[23] *See* 1955 J & K 5 (6) [(S) AIR V 42 C 2] (FB), *Murari Lal* v. *Firm Bhagwandas.* (In this case, a Full Bench of the Jammu and Kashmir High Court has also indicated its approval of the above view).

[24] 1952 Mys 69 (73) (Pr 17) [AIR V 39] : ILR (1952) Mys 201 (DB), *Subbaraya Setty and Sons* v. *Palani Chetty and Sons.* (Where a decree for payment of money was passed *ex parte* before Mysore acceded to the Indian Union, by a Madras Court against a resident in Mysore who had not submitted to the jurisdiction of that Court, the decree cannot be executed by a Court in Mysore even after accession. The decree is by International Law a nullity in Mysore and cannot be executed in Mysore).

[25] 1955 Nag 103 (103) (Pr 12) [(S) AIR V 42 C 24] : ILR (1955) Nag 194 (DB), *Ram Kisan* v. *Harmukha Rai.* (In this case, the question was not about the *execution* of the decree. The question was whether a decree passed by the Indore court against a non-resident and non-submitting person, before 26-1-1950, would operate as *res judicata* in a suit filed after 26-1-1950 in a court in Madhya Pradesh, *Held* it would not).

[*See also* 1955 Nag 236 (237) (Pr 5) [AIR V 42 C 60] : ILR (1955) Nag 613 : 1955 Cri L Jour 1275 (DB), *Govind Kesheo* v. *State of M. P.* (This case did not deal with the decree of a *civil court* but with the judgment of a *criminal* court in the Hyderabad State passed prior to 26-1-1950. It was held that this Article, clauses 1 and 2, did not apply to pre-Constitution judgments nor did they deal with the legal efficacy of judicial proceedings. Clause (3) did not apply to the case as it was not a decree of a *civil court. Held also* that a person convicted under Defence of Hyderabad Rules by a court in Hyderabad before 26-1-1950 was not disqualified under S. 10(m) of C. P. and Berar Local Govt. Act (38 of 1948) for election as councillor).

[26] 1954 Cal 67 (72) (Pr 18) [AIR V 41 C 24], *Shah Kantilal* v. *Dominion of India.* (The Okhamandal Court in Baroda State when it passed the

Cochin.[27] According to these Courts the subsequent developments which have resulted in the territories concerned ceasing to be foreign States in relation to each other cannot affect the original character of the decrees as foreign decrees. These latter Courts have also reiterated the view that this clause is not retrospective so as to apply to pre-Constitution decrees. It is submitted that the former view appears to be the better view, and that the latter view is too technical.

5. Jammu and Kashmir. — The Indian Civil Procedure Code does not apply to Jammu and Kashmir which is governed by the Jammu and Kashmir Civil Procedure Code. Under S. 44 of the Jammu and Kashmir Civil Procedure Code, as amended by Jammu and Kashmir Code of Civil Procedure (Amendment) Act, 2011 (published in Government Gazette dated 12th Baisakh, 2011, corresponding to 24-4-1954) and the relevant Government Notification issued under the above section, decrees of civil courts in any other State of India can be executed by Courts in Jammu and Kashmir. There is a corresponding provision in the Indian Civil Procedure Code under which decrees of civil Courts in Jammu and Kashmir can be executed by Courts in other States in India. But even prior to the above-mentioned amendments, on the coming into force of the Constitution, Jammu and Kashmir and the rest of India ceased to be "foreign States" with regard to each other and the Courts of Jammu

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decree had no jurisdiction against what was then a foreign State of the Dominion of India and as such its decree against the Dominion of India which was a nullity being in breach of the international law. could not be executed in India. AIR 1952 Mys 69, Rel. on; AIR 1951 Bom 190 and AIR 1951 Bom 125 (FB), Distinguished.)

[27] 1954 Trav-Co 358 (Pr 14) [AIR V 41 C 122] : ILR (1954) Trav-Co 694 (FB), *Varred* v. *Gopalbai.* (The introduction of the C. P. Code, 1908, in the Travancore Cochin State by the Code of Civil Procedure (Amendment) Act, 1951, no doubt has resulted in the former British Indian Courts ceasing to be foreign Courts in Travancore-Cochin from 1st April, 1951. But under S. 20 of the C. P. C. Amendment Act, 1951 the repeal of the Cochin Civil Procedure Code, will not affect the immunity of the defendant from execution of the decree on the ground that the decree is a nullity as far as the Cochin Courts are concerned by virtue of the definitions of foreign Court and foreign judgment in the Cochin Code of Civil Procedure and the provisions of S. 11 of that Code which provided that a foreign judgment shall not be conclusive where it has not been pronounced by a Court of competent jurisdiction because the immunity must necessarily be considered as a right of the fourth category saved by S. 20 of Act II of 1951: AIR 1951 Bom 125; AIR 1951 Bom 190; AIR 1952 Sau 90; AIR 1952 Trav-Co. 89; AIR 1953 Raj 204 (FB); AIR 1952 Hyd 801; AIR 1953 Hyd 19; AIR 1950 Cal 12; AIR 1950 Mad 293; AIR 1951 Punj 225; AIR 1952 Mys 39; AIR 1953 Madh-B 225; AIR 1954 Raj 4; AIR 1954 Cal 67 not followed to the extent that they depart from the view expressed in the case.)

and Kashmir and those of India ceased to be "foreign Courts," with regard to each other, and hence, the decrees of Courts in Jammu and Kashmir were executable by Courts in other States of India and *vice versa.*[1]

Disputes relating to Waters.

Adjudication of disputes relating to waters of inter-State rivers or river valleys.

262. (1) Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-State river or river valley.

(2) Notwithstanding anything in this Constitution, Parliament may by law provide that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (1).

GOVERNMENT OF INDIA ACT, 1935

"*Interference with Water Supplies.*

130. If it appears to the Government of any Governor's Province or to the Ruler of any Federated State that the interests of that Province or State, or of any of the inhabitants thereof, in the water from any natural source of supply in any Governor's or Chief Commissioner's Province or Federated State, have been, or are likely to be, affected prejudicially by—

(a) any executive action or legislation taken or passed, or proposed to be taken or passed; or

(b) the failure of any authority to exercise any of their powers, with respect to the use, distribution or control of water from that source, the Government or Ruler may complain to the Governor-General.

"**131.** *(1)* If the Governor-General receives such a complaint as aforesaid, he shall, unless he is of opinion that the issues involved are not of sufficient importance to warrant such action, appoint a Commission consisting of such persons having special knowledge and experience in irrigation, engineering, administration, finance or law, as he thinks fit, and request that Commission to investigate in accordance with such instruction as he may give to them, and to report to him on, the matters to which the complaint relates, or such of those matters as he may refer to them.

Article 261 — Note 5

[1] 1955 J & K 5 (6) [(S) AIR V 42 C 2] (FB), *Murari Lal* v. *Firm Bhagwandas.* (In this case, there is a complete review of the relevant provisions).

(2) A Commission so appointed shall investigate the matters referred to them and present to the Governor-General a report setting out the facts as found by them and making such recommendations as they think proper.

(3) If it appears to the Governor-General upon consideration of the Commission's report that anything therein contained requires explanation, or that he needs guidance upon any point not originally referred by him to the Commission, he may again refer the matter to the Commission for further investigation and a further report.

(4) For the purpose of assisting a Commission appointed under this section in investigating any matters referred to them, the Federal Court, if requested by the Commission so to do, shall make such orders and issue such letters of request for the purposes of the proceedings of the Commission as they may make or issue in the exercise of the jurisdiction of the Court.

(5) After considering any report made to him by the Commission, the Governor-General shall give such decision and make such order, if any, in the matter of the complaint as he may deem proper:

Provided that if, before the Governor-General has given any decision, the Government of any Province or the Ruler of any State affected request him so to do, he shall refer the matter to His Majesty in Council and His Majesty in Council may give such decision and make such order, if any, in the matter as he deems proper.

(6) Effect shall be given in any Province or State affected to any order made under this section by His Majesty in Council or the Governor-General, and any Act of a Provincial Legislature or of a State which is repugnant to the order shall, to the extent of the repugnancy, be void.

(7) Subject as hereinafter provided the Governor-General, on application made to him by the Government of any Province, or the Ruler of any State affected, may at any time, if after a reference to, and report from, a Commission appointed as aforesaid he considers it proper so to do, vary any decision or order given or made under this section:

Provided that, where the application relates to a decision or order of His Majesty in Council and in any other case if the Government of any Province or the Ruler of any State affected requested him so to do, the Governor-General shall refer the matter to His Majesty in Council, and His Majesty in Council may, if he considers proper so to do, vary the decision or order.

(8) An order made by His Majesty in Council or the Governor-General under this section may contain directions as to the Government or persons by whom the expenses of the Commission and any costs incurred by any Province, State or persons in appearing before the Commission are to be paid, and may fix the amount of any expenses

or costs to be so paid, and so far as it relates to expenses or costs, may be enforced as if it were an order made by the Federal Court.

(9) The functions of the Governor-General under this section shall be exercised by him in his discretion.

"**132.** If it appears to the Governor-General that the interests of any Chief Commissioner's Province, or of any of the inhabitants of such a Province, in the water from any natural source of supply in any Governor's Province or Federated State have been or are likely to be affected prejudicially by—

(a) any executive action or legislation taken or passed or proposed to be taken or passed; or

(b) the failure of any authority to exercise any of their powers,

with respect to the use, distribution or control of water from that source, he may, if he in his discretion thinks fit, refer the matter to a Commission appointed in accordance with the provisions of the last preceding section and thereupon those provisions shall apply as if the Chief Commissioner's Province were a Governor's Province and as if a complaint with respect to the matter had been made by the Government of that Province to the Governor-General.

"**133.** Notwithstanding anything in this Act, neither the Federal Court nor any other Court shall have jurisdiction to entertain any action or suit in respect of any matter if action in respect of that matter might have been taken under any of the three last preceding sections by the Government of a Province, the Ruler of a State, or the Governor-General."

JAMMU AND KASHMIR

Article 262 applies to the State of Jammu and Kashmir—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

1. Scope. — Under ART. 131, the Supreme Court alone has original jurisdiction in regard to inter-State disputes. In regard to one class of such disputes, namely, those relating to waters of inter-State rivers and river valleys, a special provision is made in this article.

The article contains two parts. Under the first part (cl. (1)), the exclusiveness of jurisdiction of the Supreme Court under ART. 131 can be taken away by Parliament empowering some other authority to adjudicate on the disputes. Under the second part (cl. (2)), the jurisdiction of the Supreme Court can be completely taken away by Parliament by law in any such dispute.

It must be noted that the disputes as to inter-State rivers need not necessarily be between two States. The article is wide enough to cover all such disputes whoever may be the parties, while ART. 131

only applies to disputes between States or between a State and the Union.

It is this wider scope of the article that accounts for the reference to "any other Court" in cl. (2), as otherwise, that expression would be meaningless in view of the fact that under ART. 131 it is only the Supreme Court that has jurisdiction in *inter-State* disputes and no other Court.

Under LIST 2, Entry 17, States have exclusive power over "water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of Entry 56 of LIST 1." Under LIST 1, Entry 56, the Union has exclusive power over "Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest."

Besides the procedure under ART. 131, and that under this article there is a *third* method for the settlement of inter-State disputes, which is provided by ART. 263 under which the President can set up an inter-State Council for bringing about greater co-ordination among States.

Co-ordination between States.

Provision with respect to an Inter-State Council.

263. If at any time it appears to the President that the public interests would be served by the establishment of a Council charged with the duty of—

(*a*) inquiring into and advising upon disputes which may have arisen between States;

(*b*) investigating and discussing subjects in which some or all of the States, or the Union and one or more of the States, have a common interest; or

(*c*) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject,

it shall be lawful for the President by order to establish such a Council, and to define the nature of the duties to be performed by it and its organisation and procedure.

GOVERNMENT OF INDIA ACT, 1935

"*Inter-Provincial Co-operation.*

135. If at any time it appears to His Majesty upon the consideration of representations addressed to him by the Governor-General that the public interests would be served by the establishment of the Inter-Provincial Council charged with the duty of—

(a) inquiring into and advising upon disputes which may have arisen between Provinces;

(b) investigating and discussing subjects in which some or all of the Provinces, or the Federation and one or more of the Provinces, have a common interest; or

(c) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject,

it shall be lawful for His Majesty in Council to establish such a Council, and to define the nature of the duties to be performed by it and its organisation and procedure. . . . ."

JAMMU AND KASHMIR

Article 263 applies to the State of Jammu and Kashmir.—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

Synopsis

1. Analogous law.
    - (a) Government of India Act, 1935.
    - (b) Australia.
2. Scope.

1. Analogous law. — The corresponding provision in the Government of India Act, 1935, was contained in S. 135 of that Act, which runs as follows :

(a) Government of India Act, 1935.

"135. If at any time it appears to His Majesty upon consideration of representations addressed to him by the Governor-General that the public interests would be served by the establishment of an Inter-Provincial Council charged with the duty of—

Provisions with respect to an Inter-Provincial Council.

(a) inquiring into and advising upon disputes which may have arisen between Provinces;

(b) investigating and discussing subjects in which some or all of the Provinces, or the Federation and one or more of the Provinces, have a common interest; or

(c) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject,

it shall be lawful for His Majesty in Council to establish such a

Council, and to define the nature of the duties to be performed by it and its organisation and procedure.

> An order establishing any such Council may make provision for representatives of Indian States to participate in the work of the Council : "

(b) Australia.

Section 101 of the Commonwealth of Australia Constitution Act, runs as follows : —

> "101. There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the Provisions of this Constitution relating to trade commerce, and of all laws made thereunder."

2. Scope.—Article 131 confers exclusive original jurisdiction on the Supreme Court in disputes between the Union and the States or between States *inter se*. In regard to one particular class of disputes, namely, those relating to waters of inter-State rivers and river valleys there is a further provision in Art. 262 under which Parliament may by law provide for adjudication of such disputes and further, exclude the jurisdiction of Courts in regard to them. This article contains a third method for the settling of inter-State disputes and that is by setting up an inter-State Council for bringing out greater co-ordination between the States. Such an inter-State Council may have other functions besides the settlement of disputes between States; vide cls. (b) and (c) of the article. The object of the article, therefore, is not only settling of inter-State disputes but also to provide a machinery for the co-ordination of the activities of different States in regard to matters of common interest such as research, etc. The function of the Council in regard to the settling of disputes seems to be only advisory and not decisive.

The Constitution also provides for legislation by the Union even in regard to matters in the State List where two or more States agree that such legislation would be desirable. Such legislation by the Union will, however, be only applicable to the consenting States. See Art. 252.

PART XII

FINANCE, PROPERTY, CONTRACTS AND SUITS

CHAPTER I. — FINANCE

General

264. In this Part, unless the context otherwise requires, — Interpretation.

(*a*) "Finance Commission" means a Finance Commission constituted under Article 280;

(*b*) "State" does not include a State specified in Part C of the First Schedule;

(*c*) references to States specified in Part C of the First Schedule shall include references to any territory specified in Part D of the First Schedule and any other territory comprised within the territory of India but not specified in that Schedule.

JAMMU AND KASHMIR

Part XII of the Constitution applies to the State of Jammu and Kashmir with certain exceptions and modifications.

These exceptions and modifications are indicated under the respective articles under the heading "Jammu and Kashmir".

Article 264 applies to the State of Jammu and Kashmir— The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

1. Part C States.—Clause (b) of this article excludes from the definition of "State" for the purpose of this part, Part C States. The result of such exclusion is :

(a) Under ART. 268, the Stamp duties and excise duties mentioned therein are assigned to the States. But this provision will not apply to Part C States, which means that the above duties though levied and collected in Part C States will be appropriated exclusively by the Union.

(b) Under ART. 269, various duties and taxes mentioned therein are to be levied and collected by the Government of India but are to be assigned to and distributed among the States in which the taxes and duties are leviable. This rule also does not apply to Part C States which means that in their case though the taxes and duties are leviable in their territory they will be wholly appropriated by the Union.

(c) Under ART. 270, the proceeds of income-tax are to be divided between the Union and the States. But Part C States are not entitled to share in such distribution.

What applies to Part C States also applies to the territories specified in Part D of the First Schedule and other territories forming part of India.

Taxes not to be imposed save by authority of law.

265. No tax shall be levied or collected except by authority of law.

JAMMU AND KASHMIR

Article 265 applies to the State of Jammu and Kashmir — See the Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

Synopsis

1. Analogous law.
    - (a) Government of India Act, 1935.
    - (b) United States of America.
    - (c) English law.
2. Scope.
3. This article and Art. 31.
4. "Tax".
    - (a) "Tax", meaning of.
    - (b) "Tax" and "fee"—Distinction.
    - (c) "Cess" and "fee".
5. Authority of law.
    - (a) Interpretation of taxing statutes.
6. Taxation power and Fundamental Rights — Whether Fundamental Rights are immune from taxation.
    - (a) The three great legislative powers.
    - (b) Taxation laws not subject to Art. 31.
    - (c) "Law" means valid law.
    - (d) Laws imposing taxes not immune from Fundamental Rights.
    - (e) Is Art. 19 applicable to taxing law? Are Fundamental Rights liable to be taxed?
    - (f) Nature of question involved.
    - (g) Above problem illustrated: Stamp duty on enrolment of Advocate if valid.
    - (h) Are Fundamental Rights under Art. 19 exempt from taxation?
    - (i) Reconciliation of Fundamental Rights under Art. 19 and taxing power of State.
    - (j) Fundamental Rights under Art. 19 not exempt from taxation power.
    - (k) Taxation otherwise than under valid law may be infringement of Fundamental Right under Art. 19.
    - (l) Constitutional guarantee does not mean immunity from taxation: Another example.
    - (m) Freedom of inter-State trade and commerce and power of taxation.
    - (mm) Limit to taxation power when it affects constitutionally protected rights.
    - (n) Taxing laws classified for above purpose.
    - (o) Taxing laws which are not purely fiscal statutes are subject to Art. 19.

- (p) Purely fiscal statutes.
- (q) Purely fiscal measures are outside purview of Art. 19.
- (r) Limitation apart from Art. 19 : Taxing power not to be used to destroy Fundamental Rights.
- (s) Harmonious construction of Constitution.
- (t) American law is similar : Due Process clause does not confer exemption from taxing power.
- (u) Validity of taxation laws affecting Fundamental Rights under Art. 19 is independent of provision allowing reasonable restriction of Fundamental Right.
- (v) Retrospective taxing law valid.
- (w) Compelling assistance in collection of tax — Validity.

6a. Freedom of inter-State trade, commerce and intercourse and power of taxation—See Note 6 (m) and Arts. 301 and 304 and commentary thereon.
7. Taxation and equality before the law.
8. Retrospective taxing clause.
9. Double taxation.
10. Remedies for illegal taxation.
11. "Levied or collected."

1. Analogous law. — There was no corresponding provision in the Government of India Act, 1935.[1]

(a) Government of India Act, 1935.

Article I, Sect. 8 (1) — Under this clause, Congress "shall have power to lay and collect taxes, duties, imposts and excises."

(b) United States of America.

Under English law also, all taxes are imposed by statute and no one can be forced to pay a single shilling by way of taxation which cannot be shown to the satisfaction of the Judges to be due from him under an Act of Parliament.[2]

(c) English Law.

2. Scope.—The power of taxation is an attribute of sovereignty.[1] As observed by Chief Justice Marshall in *M'Culloch* v. *The State of Maryland*[2] "the power of taxing the people and their property is essential to the very existence of government." Prof. Willis in his book, CONSTITUTIONAL LAW OF THE UNITED STATES, observes as follows :

Article 265 — Note 1

[1] 1951 SC 97 (100) (Pr 12) [AIR V 38 C 11] : 1951 SCR 127 (SC), *Ramjilal* v. *Income-tax Officer, Mohindar Garh.*

[2] Introduction to the Study of the Law of the Constitution by A. V. Dicey, Ninth Edition, 1952, P. 315.

Article 265 — Note 2

[1] 1952 Mad 395 (405) [AIR V 39 C 105] : ILR (1952) Mad 933 (DB), *S. Ananthakrishnan* v. *State of Madras.* (Per Venkatarama Ayyar J. : The right to levy tax is an incident of sovereignty and the legislatures as sovereign bodies have plenary powers of taxation subject only to such limitations as may be prescribed by the Constitution).
(1819) 4 Law Ed 579 (607) : 4 Wheat 316 (428), *M'Culloch* v. *The State of Maryland.*

[2] (1819) 4 Law Ed 579 (607) : 4 Wheat 313 (429).
[*See also* (1879) 25 Law Ed 558 (561, 562) : 10 Otto 491, *Kirtland* v. *Hotchkiss.* (Taxing power is an incident of sovereignty)].

> "The three great legislative powers usually exercised by any government are the power of taxation, the police power, and the power of eminent domain. The power of taxation may be defined as the legal capacity of government to impose charges upon persons or their property to raise revenue for governmental purposes. The levying of taxes is a legislative function; the determination of the amount of each individual's tax is an administrative function; but whether either function has been properly exercised is a judicial function. Taxation may be regarded as a contribution of people for the general benefits which they receive from the government, but the constitutionality of a tax does not depend upon a showing of benefits."

(As to the distinction between the power of taxation and police power and 'eminent domain' see ART. 31, NOTES 9 and 32).

But although an incident of sovereignty the power of taxation can only be exercised through legislation, and it is this great principle that is embodied in this article. The principle was established long ago in *Magna Carta* in England, and constitutes the basis of parliamentary sovereignty in England. "Law" in democratic countries is the expression of the will of the people through their representatives in the Legislature of the country, and hence, the principle that there can be no taxation except under the authority of law is only another form of the principle "no taxation without representation[3]" for which the American War of Independence was fought.

Just as the levy and collection of taxes require a *law*, similarly the expenditure of public money also has to be sanctioned by law by means of an Appropriation Act. (See ART. 266 (3)). (See also ARTS. **114** and 204 and the commentary thereon). Under the English law also, not a penny of revenue can be legally expended except under the authority of some Act of Parliament.[4]

3. **This article and Art. 31.**— Article 31, cl. (1) provides that no person shall be deprived of his property save by authority of law. If taxation is viewed as a kind of deprivation of property, then ART. 31 must be deemed as applicable only to deprivation of property otherwise than by taxation, inasmuch as there is a special provision in ART. 265 relating to taxation.[1] But although the Supreme Court has

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[3] 1953 Trav-Co 146 (Pr 26) [AIR V 40 C 50] : ILR (1952) Trav-Co 960 (DB), *Joseph* v. *Asst. Excise Commissioner.*

[4] Dicey's Law of the Constitution, Ninth Edition, 1952, P. 317.

Article 265 — Note 3

[1] 1955 SC 3 (4) (Pr 5) [(S) AIR V 42 C 2] : 1955 SCR 769 (SC), *Laxmanappa* v. *Union of India.*

1951 SC 97 (100) [AIR V 38 C 11] : 1951 SCR 127 (SC), *Ramjilal* v. *Income-tax Officer, Mohindar Garh.* (Like the Constitution of the United States, the Indian Constitution also has treated taxation as distinct from the compulsory acquisition of property).

expressed the proposition in this form,[2] it is submitted with respect that **Art. 31** deals with the deprivation of *specific* property and not the imposition of a legal liability to be discharged by payment. In any view, it is clear that the right not to be *taxed* except under the authority of law does not arise under **Art. 31** but under this article. As this article does not occur in **Part III** of the Constitution, the right conferred by the article is not a Fundamental Right which can be enforced by application to the Supreme Court under **Art. 32**.[3] See also **Art. 31, Notes** 9 and 32.

(a) "Tax" — Meaning of.

4. "Tax." — Under **Art. 366** cl. (28), it is expressly provided that "taxation" includes the imposition of any tax or impost, whether general or local or special, and "tax" shall be construed accordingly. According to Wharton's **Law Lexicon**, the word "impost" is wide enough to include any tax or tribute or impost levied by authority.[1] Hence, for the purpose of this Constitution, the word "tax" has to be taken in a wide and comprehensive sense as including all forms of public charges and as not limited to taxes strictly so called as distinguished from fees, cesses and so on. But this does not mean that where the Constitution uses a specific expression like a "fee," it will include a tax which is not a fee according to established tests of a fee. Fo instance, in the three Legislative Lists in the Seventh Schedule, the word "tax" is used in many entries, while the word "fee" is used in some other entries. So also, the word "duty" is used in several entries. Thus, for instance, LIST 1 Entries 82, 85, 86, 89, 90, 92 and 97 use the word "taxes." The word "duties" occurs in Entries 83, 84, 87 and 88. Entry 96 refers to "fees in respect of any of the matters in this List." Similar instances can be given from LIST 2 and LIST 3. In view of the wide definition of the word "tax" in ART. 366 cl. (28), the power to impose a tax will include a power to impose a fee, but not *vice versa*, so that if the Legislature has only the power to impose a *fee* in regard to a certain matter, a provision imposing a payment which does not satisfy the test of a "fee" would be *ultra vires*. But as already stated, the word "tax" is wide enough to include all forms of public charges and hence the provision in this article that no tax shall be levied or collected except by authority of law will hold good in the case of "fees" also.[2] So also, it is conceived that the prohibition in ART. 27 against compelling a person to pay any "taxes," the profits of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination, will also apply to the imposition of a "fee."[3]

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[2] 1955 SC 3 (4) (Pr 5) [(S) AIR V 42 C 2] : 1955 SCR 769 (SC), *Laxmanappa* v. *Union of India*.
1951 SC 97 (100) (Pr 12) [AIR V 38 C 11] : 1951 SCR 127 (SC), *Ramji Lal* v. *Income-tax Officer, Mohindar Garh.*

[3] 1955 SC 3 (4) (Pr 5) [(S) AIR V 42 C 2] : 1955 SCR 769 (SC), *Laxmanappa* v. *Union of India.*
1951 SC 97 (100) (Pr 12) [AIR V 38 C 11] : 1951 SCR 127 (SC), *Ramji Lal* v. *Income-tax Officer, Mohindar Garh.*

Article 265 — Note 4

[1] *Wharton* 495 : *Impost* — Any tax or tribute imposed by authority; particularly, a tax or duty laid by Govt. on goods imported.
[*See* 1942 All 156 (157, 168, 169) [AIR V 29] : 43 Cri L Jour 374, *Emperor* v. *Munna Lal.* (Difference between various forms of taxes explained).
(1869) 19 Law Ed 95 (98, 99) : 7 Wall 433, *Pacific Insurance Co.* v. *Soule.* (Duties are defined by Tomlin to be things due and recoverable by law. The term in its widest signification is hardly less comprehensive than taxes. It is applied in its most restricted meaning to customs: and in that sense is nearly the synonym of imposts.

Impost is a duty on imported goods and merchandise. In a larger sense it is any tax or imposition. Cowell says it is distinguished from cutsom, "because custom is rather the profit which the price makes on goods shipped out".

Excise is defined to be an inland imposition, sometimes upon the consumption of the commodity and sometimes upon the retail sale; sometimes upon the manufacturer and sometimes upon the vendor.)]
[*See also* (1827) 6 Law Ed 678 (685) : 12 Wheaton 419, *Brown* v. *The State of Maryland.* (Impost or duty levied for inspection charges is "impost or duty.")]

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[2] 1954 Raj 178 (Pr 5) [AIR V 41 C 54] : ILR (1954) 4 Raj 982, *Maharaja Shri Umaid Mills Ltd.* v. *State of Rajasthan.*

[*See* 1954 SC 282 (295) [AIR V 41 C 68] : 1954 SCR 1005 (SC), *The Commissioner, Hindu Religious Endowments* v. *Lakshmindra Thirtha Swamiar.* (In this case, Mukherjea J. delivering the judgment of the Court, after pointing out that the Constitution uses different expressions, like taxes, cesses and fees expresses the doubt whether the expression 'tax' in this Article is not used in its wider sense as including all other impositions like cesses and fees and that at least seems to be the implication of Art. 366 (28).)]

[*See also* (1922) 91 LJ KB 897 (900) : 127 LT 822, *Attorney-General* v. *Wilts United Dairies.* (*Held*: Express statutory authority necessary for imposition of fee for licence to export milk to another local area).]

[3] The question was left open by the Supreme Court in these three cases in AIR 1954 SC 282 (SC); AIR 1954 SC 388 (SC) and AIR 1954 SC 400 (SC) in which the question as to the difference between 'tax' and 'fee' was considered by the Supreme Court. In the first case, it was held that the payment under the particular Act was a 'tax' and not a 'fee' and was, therefore, beyond the competence of the State Legislature. Hence it was held that it was not necessary to decide whether the validity of the contribution was affected by Art. 27. But it was held that it was not a contribution levied for fostering any particular religion or religious denomination and hence would not be hit by Art. 27 even if otherwise it fell within the Article. Hence, the question whether Art. 27 would apply to a 'fee' did not arise. In the second case, the contribution was held to be a 'fee' and the law imposing it was within the competence of the State Legislature. But there was no issue about the validity of the imposition under Art. 27. In the *third case*, the contribution was held to be a 'fee', but it was held

Taxation, as seen in NOTE 2, is the legal capacity of sovereignty, or one of its governmental agents to exact or impose a charge upon persons or their property, for the support of Government, and for the payment for any other public purposes, which it may constitutionally carry out;[4] (see also ART. 27, NOTE 1 where definitions by Cooley and

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that it was not levied for fostering any particular religion or religious denomination.

[4] Constitutional Law of the United States by Willis, 1936, P. 716.
1952 Pat 359 (366) (Pr 13) [AIR V 39] : ILR 31 Pat 493 (SB), *Atma Ram* v. *State of Bihar*. (Taxes have been defined to mean "burdens or charges imposed by the Legislative power upon persons or property to raise money for public purposes" (Cooley : Constitutional Limitations, 7th Edn.). They of course differ from "Forced contributions, loans and benevolences of arbitrary and tyrannical periods in that they are levied by authority of law and by some rule of proportion which is intended to insure uniformity of contribution and a just apportionment of the burdens of Government" (Cooley : Taxation).)
[*See* (1936) 80 Law Ed 477 (486) : 297 US 1 (61), *United States* v. *Butler*. (A tax, in the general understanding of the term and as used in the Federal Constitution, signifies an exaction for the support of the Govt.; and the term cannot properly be applied to the expropriation of money from one group for the benefit of another).
(1934) 78 Law Ed 1109 (1113) : 292 US 40 (43), *A Magnano Co.* v. *Hamilton*. (Whether a tax is for a public purpose or not depends upon the *use* which is to be made of the revenue derived from the tax and not upon any ulterior motive or purpose which may have influenced the legislature in passing the act. A tax designed to be expended for a public purpose does not cease to be one levied for that purpose because it has the effect of imposing a burden upon one class of business enterprises in such a way as to benefit another class).
(1920) 253 US 233 (238, 239, 240) : 64 Law Ed 878, *Green* v. *Frazier*. (14th amendment does not contain any specific limitation on power of taxation. But it has come to be established that there is no power to tax merely for *private purposes*.)
(1874) 22 Law Ed 455 (461) : 20 Wall 655, *Savings and Loan Association* v. *Topeka*. (A 'tax' according to Webster's dictionary is a rate or sum of money assessed on the person or property of a citizen by Govt. for the use of the nation or the State.

Taxes are burdens or charges imposed by the Legislature upon persons or property to raise money for public purposes — Cooley's Constitutional Limitations, 479.

Taxes are a public imposition, levied by authority of the Govt. for the purpose of carrying on the Government in all its machinery and operations and are imposed for public purpose. Case law Ref.

There can be no lawful tax which is not laid for public purpose. Where the purpose for which the tax was to be imposed could no longer justly be claimed to have this public character but was purely in aid of private or personal objects, the law authorising it was beyond the legislative power and was an unauthorised invasion of private right.

It may not be easy to draw the line in all cases so as to decide what is a public purpose.)]

Willoughby are quoted and considered). The essence of **taxation is** compulsion i. e. it is imposed under statutory power **without the tax-payers'** consent.[5]

The taxing power of the State may manifest itself in three **different** forms known respectively as special assessments, fees **and taxes**[6].

(b) "Tax" and "fee"—Distinction.

Thus, there is no generic difference between a tax **and a fee.**[7] But the Constitution makes a distinction between the two for legislative purposes and while some of the entries in the Legislative Lists refer to "taxes," some others refer to "fees.[8]" Hence, where the Legislature has only the power to impose a fee, it becomes necessary to distinguish a fee from a tax and see whether the charge that is levied is really a tax or a fee.[9] This question as to the difference between a tax and a fee was considered by the Supreme Court in certain recent decisions.[10] In all of them, the judgment of the

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[5] (1933) 102 LJ PC 17 (20) : 1933 App Cas 168, *Lower Mainland Dairy, etc.* v. *Crystal Dairy Ltd.*

[6] 1954 SC 282 (296) [AIR V 41 C 68] : 1954 SCR 1005 (SC), *The Commissioner, Hindu Religious Endowments* v. *Lakshmindra Thirtha Swamiar.* (Seligman's Essays on Taxation, P. 406, Ref. to.)

[7] 1954 SC 400 (403) [AIR V 41 C 96] : ILR (1954) Cut 334 : 1954 SCR 1046 (SC), *Sri Jagannath Ramanuj Das* v. *State of Orissa.*

1954 SC 388 (395) (Pr 22) [AIR V 41 C 93] : 1954 SCR 1055 (SC), *Ratilal* v. *State of Bombay.*

1954 SC 282 (296) [AIR V 41 C 68] : 1954 SCR 1005 (SC), *The Commissioner, Hindu Religious Endowments* v. *Lakshmindra Thirtha Swamiar.*

[8] 1954 SC 388 (395) [AIR V 41 C 93] : 1954 SCR 1055 (SC), *Ratilal* v. *State of Bombay.*

1954 SC 282 (295) [AIR V 41 C 68] : 1954 SCR 1005 (SC), *The Commissioner Hindu Religious Endowments* v. *Lakshmindra Thirtha Swamiar.*

1954 Raj 178 (Prs 12, 13) [AIR V 41 C 54] : ILR (1954) 4 Raj 982. *Maharaja Shri Umaid Mills Ltd.* v. *State of Rajasthan.* (It cannot be said that where fees are prescribed by an Act of *Parliament* or Central Legislature the distinction between fees and taxes is immaterial and all fees prescribed by a Central Act must be held *to be* taxes pure and simple — The distinction between tax and fee is recognised even in regard to the legislative power of Parliament).

[9] *See* 1955 Orissa 175 (177) [(S) AIR V 42 C 48] : ILR (1955) Cut 181 (DB), *Chintamoni Sahu* v. *Cuttak Municipality.* (Orissa Municipal Act (23 of 1950) S. 290 — Power of Municipal Council under S. 290 to charge *licence fees* cannot be used for taxation. The total fees charged by the Council should not be much in excess of what the duties and responsibilities cast upon them and their staff in connection with the licences cost them).

[10] 1954 SC 400 (403) (Pr 9) [AIR V 41 C 96] : 1954 SCR 1046 : ILR (1954) Cut 334 (SC), *Shri Jagannath* v. *State of Orissa.* (On appeal from AIR 1950 Orissa 47).

1954 SC 388 (395) [AIR V 41 C 93] : 1954 SCR 1055 (SC), *Ratilal* v *State of Bombay.* (Confirming on this point, on appeal, AIR 1953 Bom 242).

Supreme Court was delivered by B. K. Mukherjea, J., as he then was. Though the question has been elaborately discussed in *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar*,[11] the following passage from *Shri Jagannath Ramanuj Das* v. *State of Orissa*,[12] may be quoted as a brief summing up of the whole position :

> "This question has been elaborately discussed in our judgment in the Madras appeal referred to above and it is not necessary to repeat the discussions over again. As has been pointed out in the Madras appeal, there is no generic difference between a tax and a fee and both are different forms in which the taxing power of a State manifests itself. Our Constitution, however, has made a distinction between a tax and a fee for legislative purposes and while there are various entries in the three lists with regard to various forms of taxation, there is an entry at the end of each one of these lists as regards fees which could be levied in respect of every one of the matters that are included therein. A tax is undoubtedly in the nature of a compulsory exaction of money by a public authority for public purposes, the payment of which is enforced by law. But the essential thing in a tax is that the imposition is made for public purposes to meet the general expenses of the State without reference to any special benefit to be conferred upon the payers of the tax. The taxes collected are all merged in the general revenue of the State to be applied for general public purposes. Thus, tax is a common burden and the only return which the tax-payer gets is the participation in the common benefits of the State. Fees, on the other hand, are payments primarily in the public interest but for some special service rendered or some special work done for the benefit of those from whom payments are demanded. Thus, in fees there is always an element of *quid pro quo* which is absent in a tax. Two elements are thus essential in order that a payment may be regarded as a fee. In the first place, it must be levied in consideration of certain services which the individuals accepted either willingly or unwill-

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1954 SC 282 (295) (Pr 45) [AIR V 41 C 68] : 1954 SCR 1005 (SC), *The Commissioner, Hindu Religious Endowments* v. *Lakshmindra Thirtha Swamiar*. (On appeal from AIR 1952 Mad 613).

[11] 1954 SC 282 [AIR V 41 C 68] : 1954 SCR 1005 (SC).

[12] 1954 SC 400 [AIR V 41 C 96] : 1954 SCR 1043 : ILR (1954) Cut 334 (SC).

[*See also* 1955 NUC (Orissa) 1126 [AIR V 42] (DB), *Special Officer District Cuttack* v. *Paramananda Rath*. (Licence fee derived from issue of licences to persons storing jute is not utilised for the benefit of such persons only, the entire fee goes to the District fund which is meant for the benefit of the entire community of the District — Licence fee is therefore a tax).]

ingly. But this by itself is not enough to make the imposition a fee, if the payments demanded for rendering of such services are not set apart or specifically appropriated for that purpose but are merged in the general revenue of the State to be spent for general public purposes."

For further authorities which explain the difference between tax and fee on similar lines, see the undermentioned cases.[13]

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[13] 1951 Orissa 1 (5) (Pr 13) [AIR V 38 C 1] : 52 Cri L Jour 43 (SB), *Rama Chandra* v. *Dist. Board Ganjam.* (Section 166 of the Madras Local Boards Act (14 of 1920) is a provision dealing with 'fees' and not with 'taxes').

1955 Orissa 175 (177) (Pr 6) [AIR V 42 C 48] : ILR (1955) Cut 181 (DB), *Chintamoni Sahu* v. *Cuttack Municipality.* (Orissa Municipal Act (23 of 1950) S. 290 — Licence fees under, should reasonably cover the cost of the special services necessitated by the duties and responsibilities imposed on the Council in respect of the supervision and regulation of places for which a licence is taken. They are intended to be a compensation to the Municipality for the expenses incurred in the issue of licences and the general regulation of trades which are licensed).

1954 All 675 (680) [AIR V 41 C 270], *Lala Raj Kishore* v. *Dist. Board of Seharanpur.* (Fee levied under bye laws of Dist. Board for licence for working factory held to be a 'tax' as the amount was not fixed with the object of meeting merely the expenses of regulating the trade or of meeting the expenses that became necessary by virtue of the framing of the bye laws but the fee was fixed with a view to enhance the general revenues of the Dist. Board).

1954 Mad 621 (633) (Pr 35) [AIR V 41 C 221] (DB), *Kutti Keya* v. *The State.* (Distinction between tax and fee — Fee is charged for services rendered (e.g.) licensing fees — Although the levy was only on a section of the public and although it was put in a separate fund and not in the consolidated fund of the State it was held to be a tax and not a service charge. It was not a levy for any *service* rendered but only for raising funds for constructing a market. *Att. Gen. for British Columbia* v. *Esquimalt & Nanaimo Ry. Co.* 1950 App Cas 87, Foll.)

1954 Raj 178 (185) (Pr 15) [AIR V 41 C 54] : ILR (1954) 4 Raj 982 (DB), *Maharaja Shri Umaid Mills Ltd.* v. *State of Rajasthan.* (Fees levied under S. 6, Factories Act are not imposed for raising general revenues and are 'fees' and not taxes. It is not a 'tax' on a trade within meaning of Art. 276).

1954 Trav-Co 504 (507) (Pr 5) [AIR V 41 C 173] : ILR (1954) Trav-Co 806 (DB), *Narayana Pillai* v. *The State of Travancore-Cochin.* (A licence fee must be commensurate with expenditure necessary for administering licensing department. — 'Tax' cannot be imposed in guise of license fee — AIR 1930 Mad 55, AIR 1931 Mad 497, AIR 1952 Mad 313, AIR 1953 Bom 242, Rel. on.)

60 CLR 263 (276), *Matthews* v. *Chicory Marketing Board.* (Taken from AIR 1954 SC 282 (295) (SC) — *Latham C. J.*, of High Court of Australia defined a 'tax' as follows — "A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not a payment for *services rendered*". According to the Supreme Court in AIR 1954 SC 282 (295) (SC), this definition brings

Applying the above tests, it was held by the Supreme Court in *Shri Jagannath Ramanuj Das* v. *State of Orissa*,[14] that the contribution levied under SEC. 49 of the Orissa Hindu Religious Endowments Act (4 of 1939), was a fee and not a tax. The payment was demanded only for the purpose of meeting the expenses of the Commissioner and his office which was the machinery set up for due administration of the affairs of the religious institution, the collections made were not merged in the general public revenue and were not appropriated in the manner laid down for appropriation of expenses for other public purposes. They went to constitute a fund contemplated by SEC. 50 of the Act to which also the Provincial Government contributed both by way of loan and grant and which was specifically set apart for the rendering of services involved in carrying out the provisions of the Act. On a similar reasoning it was held by the Supreme Court in *Ratilal* v. *State of Bombay*,[15] that the contribution levied under SEC. 58 of the Bombay Public Trusts Act, 1950, was not a tax but a fee and as such, was within the legislative competence of the State Legislature under LIST 3, Entry 47. But in *Commissioner, Hindu Religious Endowments, Madras* v. *Sri*

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out the essential characteristics of a tax as distinguished from other forms of imposition which in a general sense are included in it).

[*See also* (1932) 101 LJ KB 478 (480, 484) : (1932) 2 KB 197, *China Navigation Co.* v. *Att.-General* (There is no legal duty on the Crown to offer by its military forces protection for British ship in foreign ports against danger anticipated from piracy. The matter is one for the uncontrolled discretion of the King as head of the army. If shipowners require such protection they must pay for it if the Crown requires them *so to pay*. Such payment when made is sanctioned and controlled by Parliament in the Appropriation Act under the system of appropriations in aid under the Public Accounts and Charges Act 1891.)]

[*See however* 1939 PC 36 (38) [AIR V 26] (PC), *George Walkem Shannon* v. *Lower Mainland Dairy Products Board*. (In this case, it was held that if fees are charged for licences, it was no objection that the fees were charged in order either to defray the costs of administering the local regulation or to increase the general funds of the province or for both purposes. But as pointed out by *Narasimham, J.*, in AIR 1950 Orissa 47 (53) this decision must be deemed to be based on the wording of the particular Constitutional provision which was in question in it, namely Item 9 in S. 92 of the British North America Act 1867, which ran 'Shops' and other licences in order to the *raising of revenue*. Hence the inference cannot be drawn from this case as was done by *Dar J., in* AIR 1942 All 156 (166) that licence fees would still be 'fees' though levied for the purpose of increasing the general revenues of the State. At any rate such a view would not be good law under the decisions of the Supreme Court referred to above).]

[14] 1954 SC 400 (403) (Pr 9) [AIR V 41 C 96] : 1954 SCR 1046 : ILR (1954) Cut 334 (SC).

[15] 1954 SC 388 (395) (Pr 22) [AIR V 41 C 93] : 1954 SCR 1055 (SC).

Lakshmindra Thirtha Swamiar,[16] the Supreme Court found that the contribution levied under SEC. 76 of the Madras Hindu Religious and Charitable Endowments Act (19 of 1951) was a tax and not a fee and as such, was beyond the competence of the Madras State Legislature. In arriving at its conclusion, the Supreme Court found that although the impugned section spoke definitely of the contribution being levied in respect of the services rendered by Government there was total absence of any correlation between the expenses incurred by the Government to the amount raised by contribution. The Supreme Court observed as follows on this point :

> "But the material fact which negatives the theory of fees in the present case is that the money raised by levy of the contribution is not earmarked or specified for defraying the expenses that the Government has to incur in performing the services. All the collections go to the Consolidated Fund of the State and all the expenses have to be met not out of these collections but out of the general revenues by a proper method of appropriation as is done in case of other Government expenses. That in itself might not be conclusive, but in this case there is total absence of any correlation between the expenses incurred by the Government and the amount raised by contribution under the provision of SEC. 76 and in these circumstances the theory of a return or counter-payment or *quid pro quo* cannot have any possible application to this case."

It has been stated above that the distinguishing feature of a fee as contrasted with a tax is that a fee is levied for the purpose of meeting the expenses of the special *service* rendered by the Government, and not to augment the general revenue of the State. This statement requires a little modification as a fee may also be levied for a *privilege* conferred upon a person, as a fee for a licence. In such a case, the fee is charged for the *benefit* conferred by the State. Thus, a fee may be stated to be a levy for a service rendered or a special benefit conferred. In either case, there is an element of special *quid pro quo* in a fee which is not present in a tax. In other words, a tax is levied as a part of a common burden, while a fee is a payment for a special benefit or privilege.[17] In *Commissioner Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar*,[18] the Supreme Court observed as follows :

> "The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of a common burden, while a fee is a payment for a special benefit or privilege. Fees confer a

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[16] 1954 SC 282 (296) (Pr 49) [AIR V 41 C 68] : 1954 SCR 1005 (SC).

[17] 1954 SC 282 (295) (Pr 45) [AIR V 41 C 68] : 1954 SCR 1005 (SC). *Commissioner Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar.*

[18] 1954 SC 282 [AIR V 41 C 68] : 1954 SCR 1005 (SC).

special capacity, although the special advantage, as for example in the case of registration fees for documents or marriage licences, is secondary to the primary motive of regulation in the public interest: *vide* Findlay Shirras on SCIENCE OF PUBLIC FINANCE, Vol. I, page 202. Public interest seems to be at the basis of all impositions, but in a fee it is some special benefit which the individual receives. As Seligman says, it is the special benefit accruing to the individual which is the reason for payment in the case of fees; in the case of a tax, the particular advantage if it exists at all is an incidental result of State action: *vide* Seligman's ESSAYS ON TAXATION, p. 408."

The fact that a fee may be charged for a service rendered or a privilege conferred is indicated also by the provisions of ART. 110, cl. (2), which shows that ordinarily fees are charged for licences granted for services rendered.[19] (For similar provisions, see ART. 117 (2), ART. 199 (2) and ART. 207 (2).)

Although a contribution may be called a fee, it may in fact be a tax in the narrower sense of the term, where the proceeds of the levy are intended primarily to increase the general revenues of the State.[20] Thus, if court-fees are added to the general revenue, they will be a tax.[21]

The licence fee charged for motor vehicles is also often only a tax. In regard to such licence fees, the Supreme Court has observed:[22]

> "Here the costs incurred by the Government in maintaining an office or bureau for the granting of licences may be very small and the amount of imposition that is levied is based really not upon the costs incurred by the Government but upon the benefit that the individual receives. In such cases, according to all the writers on public finance, the tax element is predominant: *vide* Seligman's ESSAYS ON TAXATION, page 409, and if the money paid by licence-holders goes, for the upkeep of roads and other matters of general public utility, the licence fee cannot but be regarded as a tax."

The element of compulsion or coerciveness is common both to a tax and a fee and does not afford a distinguishing mark for ascertaining the nature of a levy from the point of view of its being a tax or a fee.[23] The fact that a person is not under any obligation to seek the licence or the service for which fee is charged does not make the fee a voluntary payment, just as a house tax or a land tax cannot be said to be a voluntary payment because the incidence of the tax only falls on those having a house or a land. Compulsion lies in the fact that payment is enforceable by law against a man in spite of his unwillingness or want of consent, and this element is present in taxes as well as fees.[24]

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[19] 1954 SC 282 (296) [AIR V 41 C 68] : 1954 SCR 1005 (SC), *Commissioner, Hindu Religious, Endowments Madras* v. *Lakshmindra Thirtha Swamiar.*

[20] 1954 Raj 178 (Pr 5) [AIR V 41 C 54] : ILR (1954) 4 Raj 982 (DB), *Maharaja Shri Umaid Mills Ltd.* v. *State of Rajasthan.*

[21] 1954 Raj 178 (Pr 5) [AIR V 41 C 54] : ILR (1954) 4 Raj 982 (DB), *Maharaja Shri Umaid Mills Ltd.* v. *State of Rajasthan.*

[22] 1954 SC 282 (296) (Pr 46) [AIR V 41 C 68] : 1954 SCR 1005 (SC), *Commissioner Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar.*

Ordinarily, fees are uniform and are not graded according to the capacity of a person to pay, while a tax is generally graded. But this is not a conclusive test of distinction between a fee and a tax.[25]

Where a fee is levied for a service rendered by Government, it is not necessary that the service must have been asked for, or must be accepted willingly, by the person to whom it is rendered. Even if the service is something forced on him or imposed on him and a contribution is levied to meet the expenses of the service, the contribution would be a fee.[26]

Reference has already been made to the fact that the Constitution although it uses the expression tax in its broad and comprehensive sense as including all public charges, yet draws a distinction between a tax and a fee, for legislative purposes. Article 277 also mentions taxes and fees separately. Under Art. 110, cl. (2), a bill merely providing for the imposition of fines or pecuniary penalties or payment of fees for licences or fees for services rendered is excluded from the definition of a Money Bill. There is a similar provision in ART. 199 which relates to money bills in State Legislatures. But, as pointed out in the commentary on ART. 110, this circumstance alone is no indication that a fee is excluded from the meaning of 'tax' for the purpose of ART. 265 or 27. In this connection, liberty is taken to point out, with respect, the slight inaccuracy that has, due to an obvious oversight, crept into the judgment of the Supreme Court in *Commissioner, Hindu Religious Endowments Madras* v. *Sri Lakshmindra Thirtha Swamiar*,[27] which inaccuracy is also repeated in the judgment of the Supreme Court in *Ratilal* v. *State of Bombay*.[28] It is said in these judgments that a Bill would not be a Money Bill by reason only that it provides for the imposition of fines or for the demand or payment of fees for licences or fees for services rendered, whereas a Bill dealing with imposition for regulation of a tax will *always* be reckoned as a Money Bill. The statement that a Bill providing for the imposition of tax will always be a Money Bill is not correct, as a Bill providing for the imposition, etc., of local taxes, that is, of any tax by any local authority or body for local purposes is also excluded from the definition of a Money Bill under the above provisions. Under Art. 366, cl. (28), 'tax' will include local taxes also. Hence, it would appear that from the mere fact that a Bill for the levy of fees for licences or services rendered has been excluded from the definition of a Money Bill it cannot be argued that the Constitution treats fee as not included in 'tax'. In fact, the contrary is the indication in ART. 366, cl. (28).

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[23] 1954 SC 282 (295) [AIR V 41 C 68] : 1954 SCR 1005 (SC), *Commissioner, Hindu Religious Endowments Madras* v. *Lakshmindra Thirtha Swamiar.*

[24] 1954 SC 282 (295) [AIR V 41 C 68] : 1954 SCR 1005 (SC), *Commissioner, Hindu Religious Endowments Madras* v. *Lakshmindra Thirtha Swamiar.*

[25] 1954 SC 400 (403) [AIR V 41 C 96] : ILR (1954) Cut 334 : 1954 SCR 1946 (SC), *Sri Jaganath* v. *State of Orissa.*

1954 SC 282 (295, 293) [AIR V 41 C 68] : 1954 SCR 1005 (SC), *Commissioner, Hindu Religious Endowments Madras* v. *Lakshmindra Thirtha Swamiar.* (Ordinarily fees are uniform and no account is taken of the varying abilities of different recipients to pay, *vide* Lutz on "Public Finance" P. 215—These are undoubtedly some of the general characteristics but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases.)

[26] 1954 SC 282 (296) [AIR V 41 C 68] : 1954 SCR 1005 (SC), *Commissioner, Hindu Religious Endowments Madras* v. *Sri Lakshmindra Thirtha Swamiar.* (In the present day concept of a State, it cannot be said that services could be rendered by the State only at the request of those who require these services. If in the larger interest of the public, a State considers it desirable that some special service should be done for certain people, the people must accept these services, whether willing or not : vide Findlay Shirras on "Science of Public Finance". Vol. I P. 202).

Where the provision imposing what purports to be a fee is impugned as being *ultra vires* on the ground that the imposition is in reality a tax which the Legislature is not competent to levy, the burden of proving that the contribution levied is a tax and not a fee is on the party impugning the validity of the levy.[29] But where definite facts are alleged in an affidavit by a party impugning a levy which show that the payment is not a fee but a tax as there is no correlation between the amount levied and any services rendered in return, the mere *ipse dixit* of the taxing authority will not be sufficient to refute the allegations and to establish the required nexus.[30]

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[27] 1954 SC 282 (295) (Pr 42) [AIR V 41 C 68] : 1954 SCR 1005 (SC).

[28] 1954 SC 388 (395) (Pr 22) [AIR V 41 C 93] : 1954 SCR 1055 (SC).

[29] 1954 All 675 (Pr 10) [AIR V 41 C 270] (DB), *Lala Raj Kishore* v. *Dist. Board of Seharanpur.*

[30] 1954 All 675 (Pr 21) [AIR V 41 C 270] (DB), *Lala Raj Kishore* v. *Dist. Board of Seharanpur.* (The Court cannot accept that there is a rational nexus between the amount of the fee and the expenses, and the same are very close to each other because the Board, the levying authority, says that it is so. If allegaions like these are accepted it would amount to accepting the *ipse dixit* of the Board.

Where the Legislature has the power to impose a tax, the fact that it imposes what purports to be a fee but which really is not a fee but a tax will not affect the validity of the imposition.[31] As already stated, where the Legislature has the power to impose a tax, the power will include a power to levy a fee instead of a tax, as 'tax' as defined under ART. 366, cl. 28, has a comprehensive connotation so as to cover all forms of public charges.

(c) "Cess" and "fee"

As stated already, the taxing power of the State may manifest itself in three different forms known respectively as special assessments, fees and taxes. A cess is a special assessment. A cess is a tax levied for a specific purpose, often with a prefixed word defining the object, such as irrigation cess, etc.[32]

5. Authority of law.—This article enacts the general principle that no tax will be levied except under the authority of law.[1] This is

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Where definite facts have been asserted in the affidavit filed by the petitioners along with the petitions, which have given the approximate amount of money recovered as the licence fee by the Board every year, and it is also said that not a single officer of the Board visited or inspected any of the factories belonging to the petitioners and to others, nor has the District Board spent anything on the working of the bye-law under which the licences had been issued, and there is a clear assertion that there has been no increase in the staff of the Public Health Department at all since the introduction of the bye-law and no special staff has been employed by the Board for the purpose of regulating the petitioners' trades, nor has any additional expenditure been incurred due to the enforcement of these bye-laws, in controverting these assertions, the Board should file their accounts.

Mere extracts from the account-books typed on separate sheets of paper which are not even copies of the account books cannot be of any possible assistance. The omission of the District Board to file the account books, in spite of an opportunity being given to it, goes against the District Board, and this fact can be taken into consideration in coming to a conclusion on the facts that have to be decided in the case.)

[31] 1954 Trav-Co 504 (507) (Pr 5) [AIR V 41 C 176] : ILR (1954) Trav-Co 806 (DB), *Narayana Pillai* v. *State of Trav-Cochin.* (A Legislature entitled to impose a tax either directly or by delegated legislation may impose *it, by whatever name* it may be called. The circumstance that a particular impost is called a *licence fee* will not conclude the matter. If the impost is authorised the nomenclature given to it as a licence fee will not affect its validity.)

[32] 1954 Madh-B 196 (201) (Pr 15) [AIR V 41 C 87] (DB), *Gwalior Sugar Co. Ltd.* v. *State of Madhya Bharat.*

1942 All 156 (136, 167) [AIR V 29] : 43 Cri L Jour 674, *Emperor* v. *Munna Lal.*

Article 265 — Note 5

[1] 1954 Cal 271 (274) [AIR V 41 C 98], *Amarendra Narayan Roy* v. *Commr. of Income-tax, West Bengal.*

[See 1954 Raj 178 (Pr 7) [AIR V 41 C 54] : ILR (1954) 4 Raj 982. *Maharaja Shri Umaid Mills Ltd.* v. *State of Rajasthan.* (Licence fees for factories a principle recognized in all democratic countries. Even in England, which has not a written constitution, the established principle is that express statutory authority is necessary for the imposition of taxes.[2] As seen in Note 2, this principle dates from the *Magna Carta* in England. Reference may also be made to the general principle of British jurisprudence that no member of the Executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of justice.[3]

This article is analogous to Arts. 21 and 31. Under Art. 21, no person shall be deprived of his life or personal liberty except according to procedure established by law. Under Art. 31, cl. (1), no person shall be deprived of his property save by authority of law.

The word "law" has the same meaning in this article as it has in Arts. 21 and 31, and refers to statutory law. (See Art. 21, Note 8 and Art. 31, Note 5). This means that unless there is express *legislative* provision for the imposition of a tax, the tax cannot be levied.[4] Mere executive orders will not amount to "law" within the meaning of this article.[5]

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levied under sliding scale according to horse power & men employed by Rajasthan State under Rajasthan Factory Rules whether tax or 'fee' has authority of law behind it.)]

[2] Halsbury's Laws of England, (Hailsham Edition), Vol. 6. pp. 452, 453; Vol. 24, p. 332.

In England, taxes are made payable in two different ways, i.e., either by annual enactment in the Finance Act or by Acts which impose the tax until repeal or amendment or for a fixed period exceeding one year. (Dicey's Law of the Constitution, Ninth Edition (1952), p. 314.)

(1913) 1 Ch 57 (84, 85) : 82 LJ Ch 124, *Bowles* v. *Bank of England*.

[*See* (1936) 105 LJ PC 135 (139) : (1936) 2 All ER 1131, *Ferrier* v. *Scottish Milk Marketing Board*. (It is a sound and well-recognised principle that a taxing statute must impose a charge in clear terms or fail, since it is to be construed *contra proferentem* : *Levene* v. *Inland Revenue Commissioners*, 97 LJ KB 377 (382), Rel. on.)]

[*See* (1922) 91 LJ KB 897 (900) : 37 LTR 884, *Attorney-General* v. *Wilts United Dairies*. (Imposition of licence fee — Statutory authority is required.)]

[3] 1931 PC 248 (252) [AIR V 18] (PC), *Eshugbayi* v. *Officer Administering Govt. of Nigeria*.

[4] 1953 Trav-Co 146 (155) (Pr 26) [AIR V 40 C 50] : ILR (1952) Trav-Co 960 (DB), *Joseph* v. *Asst. Excise Commissioner*.

[5] 1954 Madh-B 193 (200, 201) (Pr 14) [AIR V 41 C 87] (DB), *Gwalior Sugar Co. Ltd.* v. *State of Madhya Bharat*. (The essence of the law is that it is enforceable in the Courts of law and is not capable of being rejected by the Courts as uncertain. The element of compulsion cannot be a valid criterion for distinguishing a law from an executive order and a decision taken for administrative purposes and enforced as such cannot by that enforcement become a law or acquire the force and effect of law.)

A mere resolution of a House of the Legilsature will not be a law so as to justify the imposition of a tax.[6] (See also ART. 105, NOTE 7.)

Rules framed under statutory authority and having the force of law are "law" for the purpose of this article.[7]

It is not necessary that the taxing clauses of a statute relating to a particular matter must be embodied in a separate enactment and must not form part of the same statute along with other provisions unconnected with the taxation.[8]

The "law" imposing a tax must be a valid law.[9] (See also ART. 21, NOTE 8 and ART. 31, NOTE 5).

Thus, the law imposing a tax may be impugned as being beyond the legislative powers of the particular Legislature by which it was

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1954 Raj 162 (Pr 11) [AIR V 41 C 49] : ILR (1953) 3 Raj 664 (DB), *Somath Mal* v. *State of Rajasthan.* (Fact that the order of the Ruler was not published in the official gazette as usual in the case of laws was held to indicate that it was only an executive order, even assuming that he had absolute legislative power also.)

1953 Raj 180 (181) (Pr 3) [AIR V 40 C 63] : ILR (1953) 3 Raj 52 (DB), *Bhanwarlal v. Rajasthan State.* (Entertainment tax levied by Municipal Board on *cinema* patrons collected and paid by cinema owner—Tax levied with the sanction of *Govt.* granted before Constitution — But no authority of *law* — Held *whatever* may be position prior to Constitution authority of law was necessary for continuing to levy the tax.)

1953 Trav-Co 146 (155) (Pr 26) [AIR V 40 C 50] : ILR (1952) Trav-Co 960 (DB), *Joseph* v. *Asst. Excise Commissioner.* (The 'law' under this Article is statute law, i.e., an Act of the Legislature. A law authorising the levy of a tax must be made by the legislature and cannot be made by executive action : *Attorney-General* v. *Wilts United Dairies* (1922) 91 LJ KB 897, **Rel. on.**)

[6] (1913) 1 Ch 57 (84, 85) : 82 LJ Ch 124, *Bowles* v. *Bank of England* (Resolution of Committee of House of Commons for Ways and Means assenting to income-tax at a certain rate for the ensuing financial year, does not either *per se* or after adoption by the House of Commons authorize the Crown to levy on the subject the tax so assented to before the tax has been actually imposed by *Act of Parliament.*)

[*See also* (1884) 12 QBD 271 (274) : 53 LJ QB 209, *Bradlaugh* v. *Gossett.* (1839) 112 ER 1112 (1153, 1154) : 8 LJ QB 294, *Stockdale* v. *Hansard*].

[7] 1954 Raj 178 (Pr 14) [AIR V 41 C 54] : ILR (1954) 4 Raj 982 (DB), *Maharaja Shri Umaid Mills* v. *State of Rajasthan.* (Licence fees for factories levied under Rules under Factories Act have the "authority of law".)

1954 Trav-Co 504 (511) (Pr 11) [AIR V 41 C 176] : ILR (1954) Trav-Co 803 (DB), *Narayana Pillai* v. *State of Travancore-Cochin.*

[8] 1942 All 156 (162) [AIR V 29] : 43 Cri L Jour 674, *Emperor* v. *Munna-Lal.*

[9] 1955 SC 661 (669) [(S) AIR V 42 C 101] : (1955) 2 SCR 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

1955 Mys 49 (58) (Pr 27) [AIR V 42 C 20] : ILR (1955) Mys 20 (DB), *City Tobacco Mart* v. *Income-tax Officer.*

passed, according to the allocation of legislative topics under the Legislative Lists, in the Seventh Schedule.[10] Similarly, the law imposing a tax may be impugned as contravening the equality clause in the Constitution, ART. 14 (see NOTE 7 and ART. 14, NOTE 17) or other provisions relating to Fundamental Rights (see NOTES 6 and 7). So also, a taxing law must comply with other constitutional provisions as, for example, ART. 286. In the case of State laws imposing taxation, there must be sufficient territorial nexus between the State and the person, object or transaction taxed.[11] (See also ART. 245, NOTE 15 (bb) and ART. 286, NOTE 6.)

But where the validity of a taxing statute is questioned in Courts, every presumption should be made in its favour. Only clear and demonstrated usurpation of power will authorise judicial interference with legislative action.[12] For a discussion of the general principles relating to the questioning of the validity of legislative enactments, see ART. 245, NOTE 16.

But as it is the general principle of constitutional law that the wisdom or the justice of a legislative measure, which is otherwise constitutionally valid, cannot be questioned in a court of law, a tax imposed by a valid statute cannot be questioned in a court of law as excessive, unjust or oppressive.[13]

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[10] 1952 Pat 359 (365) (Pr 15) [AIR V 39] : ILR 31 Pat 493 (SB), *Atma Ram* v. *State of Bihar.* (Where vires of Statute is being assailed as being beyond legislative competency of State legislature, rules made under the taxing Act can be called in aid in order to understand the scheme and purpose of the legislation : *Ex parte wier;* (1871) 6 Ch App 875, AIR 1952 Pat 106, Ref.)

[See 1954 SC 282 (296) [AIR V 41 C 68] : 1954 SCR 1005 (SC), *The Commissioner, Hindu Religious Endowments* v. *Lakshmindra Thirtha Swamiar.* (In this case, the contribution imposed by S. 76 of the Madras Hindu Religious and Charitable Endowments Act, 1951, was held to be a 'tax' and not a 'fee' and hence beyond the competence of the Madras State Legislature.)]

[11] 1954 Punj 264 (267) (Pr 10) [AIR V 41 C 129] : ILR (1955) Punj 58 (DB), *Surrendara Transport and Engineering Co. Ltd.* v. *State of Punjab.* (In order to decide whether a tax has been lawfully imposed by a State, it is necessary to enquire—

(1) whether it was enacted for the purposes of the State;

(2) whether the tax falls within the description of taxation set out in an entry of the State List;

(3) whether the person, property or business to be taxed is within or associated with the State, or in other words, whether there is a sufficient territorial connection between the object to be taxed and the taxing State; and

(4) whether there is anything in the Constitution or in any other law for the time being in force to indicate that the tax is not valid.)

[*See also* 1955 NUC (USA) 5477 [AIR V 42] : 98 Law Ed 744 (748), *Miller Brothers Co.* v. *State of Maryland.* (Due process requires some definite link, some minimum connection, between a State and the person, property or transaction it seeks to tax — Compelling collection and payment of a use tax on goods by non-resident vendor held to be violative of due process clause.)]

[12] (1920) 64 Law Ed 878 (881) : 253 US 233 (239), *Green* v. *Frazier.*

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[13] 1954 Punj 264 (267) (Pr 12) [AIR V 41 C 129] : ILR (1955) Punj 58 (DB), *Surrendara Transport and Engineering Co. Ltd.* v. *State of Punjab.* (The mode, form and extent of taxation are limited only by the provisions of the Constitution and the wisdom of the Legislature. The rate at which a particular tax ought to be imposed can obviously be determined by the appropriate legislative authority and it is for the authority alone to decide what relation if any the tax should bear to the degree of benefit received by the tax-payer. The authority may charge a nominal tax, and encourage a particular class of transactions; it may charge a small tax and restrict the number of transactions; it may charge a heavy tax and prevent the transactions altogether. If the tax is otherwise valid, the mere fact that the State has decided to charge a heavy tax when it could as easily have charged a lighter one would not detract from the validity of the tax.)

1952 Mad 395 (405) [AIR V 39 C 105/35] : ILR (1952) Mad 933 (DB), *Ananthakrishnan* v. *State of Madras.* (Per Venkatarama Ayyar J.: The right to levy tax is an incident of sovereignty and the legislatures as sovereign bodies have plenary powers of taxation subject only to such limitations as may be prescribed by the Constitution.)

(1920) 253 US 233 (239, 240) : 64 Law Ed 878, *Green* v. *Frazier.*

(1911) 55 Law Ed 389 (419, 420) : 220 US 107, *Flint* v. *Flint Tracey Co.* (When the sovereign authority has exercised the authority to tax a legitimate subject of taxation as an exercise of a franchise or privilege it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable.

The right to select the measure and object of taxation devolves upon the Congress, and not upon the Courts, and such selections *are valid* unless constitutional limitations are overstepped. It is no part of the function of a Court to inquire into the reasonableness of the excise, either as respected the amount or the property upon which it is imposed.)

(1904) 195 US 27 (55, 60, 62, 63) : 49 Law Ed 78, *McCary* v. *United States.* (Excise which does not conflict with any express limitation of the Federal Constitution cannot be held invalid because the Court may deem the rate of taxation too high.

The excise on artificially coloured oleomargarine, imposed by the Act of August 2, 1886 as amended by the Act of May 5 of 1902 does not infringe the constitutional guarantee of due process of law because the effect of the tax may be to suppress the manufacture of the article.

The motives or purposes of congress in enacting the tax imposed are not open to inquiry in considering the power of that body to enact such legislation.)

(1901) 181 US 324 (329) : 45 Law Ed 879, *French* v. *Barber Asphalt Paving Co.* (Apportionment of entire cost of street pavement upon abutting lots according to their frontage, without any preliminary hearing as to benefits, may be authorised by legislature and this will not constitute a taking of property without due process of law.)

(1888) 31 Law Ed 763 (736, 767) : 125 US 345, *Spencer* v. *Merchant.* (Improvement levies — Legislature is final authority to determine how the expenditure is to be distributed.)

In *Anantakrishnan* v. *State of Madras,*[14] Venkatarama Ayyar, J., observed as follows :

> "The law undoubtedly is that the sovereign power of taxation is absolute, that it could be exercised up to any limit, that the determination of that limit is for the Legislature and that it knows

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(1879) 25 Law Ed 558 (562) : 10 Otto 491, *Kirtland* v. *Hotchkiss.* (Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction : *Cleveland etc. Railroad Co.* v. *Pennsylvania,* (1873) 21 Law Ed 179 : 15 Wall 300, Foll.)

(1869) 75 US 482 (487, 488) : 8 Wall 533, *Veazie Bank* v. *Fenno.* (The power to tax may be exercised oppressively upon persons, but the responsibility of the Legislature is not to the Courts but to the people by whom its members elected. So if a particular tax bears oppressively upon a corporation or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution.)

(1869) 19 Law Ed 95 (98, 99) : 7 Wall 433, *Pacific Insurance Co.* v. *Soule.* (Where the power of taxation, exercised by Congress, is warranted by the Constitution, as to mode and subject, it is necessarily unlimited in its nature. Congress may prescribe the *basis, fix the rates and require* payment as it may deem proper. Within the limits of the Constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the Government.)

[*See* (1898) 43 Law Ed 443 (447) : 172 US 269 (279), *Norwood* v. *Baker.* (Abuse of power: It was held that the Act in question was an act of confiscation and not a valid exercise of taxing power.)

(1874) 22 Law Ed 455 (461, 462) : 20 Wall 655, *Savings and Loan Association* v. *Topeka.* (Given a purpose or object for which taxation may be lawfully imposed, the extent of its exercise is in its very nature unlimited.)]

[*See also* (1928) 72 Law Ed 624 (631) : 276 US 394 (412, 413), *Hampton Jr. & Co.* v. *United States.* ("So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes cannot invalidate congressional action. The fact that congress declares that one of its motives in fixing the rates of duty is so to fix them that they shall encourage the industries of this country in the competition with producers in other countries in the sale of goods in this country, cannot invalidate a revenue act so framed".)

(1919) 63 Law Ed 493 (496) : 249 US 86 (93, 94), *United States* v. *Doremus.* (An excise tax levied by Congress may not be declared unconstitutional merely because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress, that is sufficient to sustain it.

If legislation enacted by Congress has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it: *Veazie Bank* v. *Fenno,* (1869) 8 Wall 533 (541) : 19 Law Ed 482 (485), Rel. on.)]

[14] 1952 Mad 395 (408) [AIR V 41 C 105/35] : ILR (1952) Mad 933 (DB).

of no limitations except what are prescribed by the Constitution. The laws fixing taxes cannot be questioned in the Courts on the ground that the tax is heavy and oppressive ......"

Referring to the taxing power of the State the Supreme Court of America observed as follows in *The Providence Bank* v. *Alppeus Bellings and Pittman*:[15]

> "This vital power may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State Governments. The interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security where there is no express contract against unjust and excessive taxation as well as against unwise legislation generally."

The levy of income-tax on an agreed basis is not illegal.[16]

In *V. M. Syed Mohamed and Co.* v. *State of Madras*,[17] the imposition of sales tax under the Rules framed under the Madras General Sales Tax Act, 1939, was questioned on the ground that the Act had unconstitutionally delegated legislative power to the executive and that the Rules did not constitute 'law' within the meaning of this article. The contention was rejected and it was held that the delegation of rule-making power under the Act did not exceed the constitutionally permissible limits.

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[15] (1830) 7 Law Ed 939 (956) : 4 Pet 514 (563).
[*See also* (1879) 25 Law Ed 558 (562) : 10 Otto 491, *Kirtland* v. *Hotchkiss*. (*The Providence Bank v. Billings and Pittman,* (1830) 4 Pet 514 : 7 Law Ed 939, foll.)].

[16] 1954 Cal 271 (275, 276) (Prs 19, 20) [AIR V 41 C 98], *Amarendra Narayan* v. *Commr. of Income-tax, West Bengal.* (It is settled that the *liability* to pay income-tax depends upon the *charging sections* and not upon those parts of the Income-tax Act which relate to the machinery of realising the tax, and so far as the machinery portion is concerned, it is open to the subject to waive the same : AIR 1947 FC 32, Rel. on.

Since the citizen has an existing liability to pay taxes there seems to be no law preventing him from paying the taxes on an *agreed basis,* and for this purpose the existence of an assessment order is not essential: *W. H. Cockerline & Co. v. Commrs. of Inland Revenue,* (1930) 16 Tax Cas 1, Rel. on.

There is therefore nothing illegal in the proceedings introduced by the Government of India variously known as *Concessional Scheme* or *Disclosure Proceeding.* The difficulties inherent in following concealed income in this country are well-known. If at any given point of time the authorities tempt the assessee with concessions and induce him to come out with a voluntary disclosure of concealed income and agree to pay the proper taxes upon them, such proceedings cannot be said to be contrary to law or that they offend any provision of law.)
[*See also* 1955 SC 1 (3) [(S) AIR V 42 C 1] : 1955 SCR 773 (SC), *Gopal Das* v. *Union of India.* (Taxation on basis of settlement — Remedy, if any, is not under Art. 32.)]

[17] 1953 Mad 105 (112) [AIR V 40 C 35] : 1953 Cri L Jour 277 (DB).

Interpretation of taxing Statutes. — Express and unambiguous language is indispensable in a statute imposing a tax.[18] See also the undermentioned case.[19]

(a) The three great legislative powers.

6. Taxation power and Fundamental Rights — Whether Fundamental Rights are immune from taxation. — As seen in NOTE 9 on ART. 31, the power of taxation is one of the three great legislative powers of the Government, the other two powers being the police power and the power of eminent domain. Under this Constitution, these powers are conferred by different provisions. The power of taxation is conferred by this article, the power of eminent domain by ART. 31, and the police power, which may be translated as the regulatory power of the State imposing restrictions on the liberty of the subject in various forms, is contained in ART. 246 read with legislative entries and is recognised in ARTS. 19 and 21. These powers must be kept distinct from each other, and in determining the validity of any action or law by the State it must be seen under what category it falls and whether it is within the limits of the power of the State in that category. If the State action or the law is a *bona fide* and genuine exercise of the State power falling within one category, and is within the limits imposed by the Constitution in regard to such power, the State action or the law will be valid notwithstanding the limits of the powers of the State which fall under other categories.

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[18] 1955 NUC (Bom) 1788 [AIR V 42], *S. S. Miranda Ltd.* v. *State of Bombay.* (It is elementary that a taxing statute must always be construed in favour of the subject; and if Government claims any power of taxation, it must satisfy the Court that such a power is clearly conferred upon it *by the Legislature.* The mere fact that the Legislature was competent to impose a particular type of tax cannot lead to the necessary or inevitable inference that that power was conferred upon the delegated authority.

There is absolutely no indication in S. 19 of the Bombay Abkari Act, 1878, that the Legislature delegated to the State Government the very important power of levying excise duty more than once and at more than one point during the progress of the excisable goods from the time that they left the bounded warehouse till the time that they reached the consumer.)

See Craies on Statute Law, Fifth Edition, 1952, P. 106.

[19] 1954 Hyd 1 (11) [AIR V 41 C 1] : ILR (1953) Hyd 673 (FB), *Buchi Rajalingam* v. *State of Hyderabad.* (Per Srinivasachari J. : I am not unaware of the fact that fiscal statutes should be construed in favour of the subject, but revenue law and taxing statutes are to be construed liberally because they are not penal statutes — Interpretation of Taxing Statutes, p. 509 by Crawford. The safe rule of construction of a revenue law or a taxing statute has been stated by Cooley as follows: "Revenue laws are not to be construed from the standpoint of the tax payer alone nor of the Government alone." There is no legal presumption that the citizen will, if possible, evade his duties or on the other hand that the Government will exact unjustly or beyond its needs — Cooley on Taxation, page 272).

(b) Taxation laws not subject to Art. 31.

Thus, as seen in NOTE 3, the deprivation of property contemplated by ART. 31 is only deprivation otherwise than by taxation. When the deprivation takes the form of taxation, its validity falls to be considered under this article and not under ART. 31. Thus, the right conferred by this article is not a Fundamental Right as the article is not contained in PART III of the Constitution.[1]

(c) "Law" means valid law.

But under this article, taxation can be imposed only under authority of law and a law means a *valid* law.[2] The validity of a law depends on various factors. Thus, the legislative competency of the particular Legislature to make laws on a certain matter according to the allocation of subjects of legislation between the Central and State Legislatures will be one of the factors to be considered. Similarly, under ART. 13, any law, which contravenes the Fundamental Rights guaranteed by PART III of the Constitution, shall, to the extent of the contravention, be void. Article 13 and the Fundamental Rights apply to the determination of the validity of *all* laws, including those which are made by virtue of provisions of the Constitution which expressly or by necessary implication confer on the State certain *specific powers*.

For instance, ART. 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. The deprivation of life or personal liberty requires, thus, no more than the authority of a legislative enactment. But this does not mean that the law by which such deprivation is effected may violate the other provisions of the Constitution. For instance, the validity of the law under which a person is deprived of his personal liberty may be impugned on the ground that the law contravenes the provisions of ART. 22 or ART. 20. Similarly, although under ART. 31 a person may be deprived of his property, when such deprivation is authorised by a legislative enactment, the validity of such enactment can be questioned on the ground of its infringing the other provisions of PART III of the Constitution, as for instance cl. (2) of ART. 31, ART. 14 and so on.

Article 265 — Note 6

[1] 1955 SC 3 (4) (Pr 5) [(S) AIR V 42 C 2] : 1955 SCR 769 (SC), *Laxmanappa v. Union of India.*
1951 SC 97 (100) (Pr 12) [AIR V 38 C 11] : 1951 SCR 127 (SC), *Ramjilal v. The Income-tax Officer, Mohindargarh.*
1953 Trav-Co 146 (155) (Pr 27) [AIR V 40 C 50] : ILR (1952) Trav-Co 960 (DB), *Joseph v. Asst. Excise Commr.*

[2] 1955 SC 661 (669) [(S) AIR V 42 C 101] : (1955) 2 SCR 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

(d) Laws imposing taxes not immune from Fundamental Rights.

Similarly, the validity of a law imposing taxation under this article can also be questioned on the ground of its infringement of a person's Fundamental Rights under PART III of the Constitution, although the law is made not merely in the exercise of the *general* legislative power of the State under ART. 246 read with the relevant legislative entries in SCH. VII but in exercise of the *specific power* of taxation conferred by this article. Thus, under ART. 27 no person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. Hence, although a tax may be imposed by a "law" the validity of the law may be questioned as contravening ART. 27.[3] Similarly, the validity of a law imposing a tax can be questioned as infringing the guarantee of equality before the law or the equal protection of the laws under ART. 14—see NOTE 7 *infra* and ART. 14, NOTE 17. See also the undermentioned case.[4]

(e) Is Art. 19 applicable to taxing law: Are Fundamental Rights liable to be taxed ?

But, before a law can be held to be void on the ground of its contravening a particular article conferring a Fundamental Right, it has to be seen whether such article is intended to apply to the subject-matter of that law at all. Thus, it has been seen in the commentary on ART. 21, that as between ARTS. 19 and 21, ART. 19 has no application at all to a case where a person is totally deprived of his personal liberty by incarceration and that his rights must be determined only under ART. 21 (see ART. 21, NOTE 5), so that the validity of any law under which such person is deprived of his liberty cannot be questioned on the ground that his rights guaranteed under ART. 19 are taken away by such law. Similarly, it has been seen that where a person is totally deprived of his property, his rights fall to be decided under ART. 31 and not ART. 19 (see ART. 31, NOTE 4) and the validity of the law under which he is so deprived of his property cannot be questioned on the ground that his right under ART. 19 (1) (f) to acquire, hold and dispose of property has been adversely affected. So also, in the matter of taxation, where a person is taxed illegally, it is his right under this article that is violated and ART. 31 has no application at all although taxation involves the deprivation of a person of his property (see NOTE 3).

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[3] 1952 Mad 613 (642) (Pr 57) [AIR V 39], *Lakshmindra Theertha Swamiar* v. *Commr. Hindu Religious Endowments, Madras.* (Held that S. 76 of Madras Hindu Religious and Charitable Endowments Act, 1951, was bad under Art. 27 as imposing a contribution which was a 'tax' and not a 'fee' which was applied for fostering a particular religion. *Note*: On appeal the Supreme Court in AIR 1954 SC 282 (296) (SC) endorsed the view that the contribution was not a 'fee' but a 'tax' but held that it could not be said that it was applied for promoting any particular religion.).

[4] 1953 Mad 337 (339, 340) [AIR V 40 C 114] : 1953 Cri L Jour 625, *Public Prosecutor* v. *Ayyappan Pillai.* (Held: Amendment providing a new mode of recovery of sales-tax, viz., "as if it were a fine" did not offend the rule against *ex post facto* laws in Art. 20.)

Similarly, the question has arisen whether an otherwise valid law imposing a tax can be impeached as violating the provisions of ART. 19. Thus, under ART. 19, various personal rights are guaranteed by the Constitution as, for instance, the right to acquire, hold and dispose of property, the right to practise any profession, the right to carry on any occupation, trade or business. The imposition of a tax in respect of these rights will necessarily mean a burden or restriction placed on them to that extent.[5] Take, for instance, the profession tax. It is clear that to the extent the tax is a burden on the practice of a profession, the tax is a restriction of the right to practise the profession. Similarly, it may be argued that an export duty operates as a restriction *pro tanto* of the right to trade. (ART. 19 (1) (g).) The stamp duty that is charged on conveyances means that to the extent of the burden imposed, there is a restriction on the right to transfer property—a right which is guaranteed under ART. 19, clause (1) (f). Similarly, sales tax operates as a restriction on the Fundamental Right under ART. 19 (1) (g) to carry on business.[6] It is clear that the imposition of a tax on any activity which is covered by ART. 19 is to that extent a restriction of the right guaranteed by that article. Is then such a tax liable to be questioned as unconstitutional and if so, under what circumstances? In other words, is ART. 19 applicable to a law under ART. 265 imposing a tax?

(f) Nature of question involved.

This raises the question as to what is the true effect of ART. 19. Is it intended to be applicable to the exercise of *taxing power* by the State *at all*? Although the imposition of a tax on an activity, the right to engage in which is guaranteed as a Fundamental Right, does operate as a restriction to a greater or less extent on the freedom of such activity and on the exercise of such Fundamental Right, that will not necessarily involve the *violation of* ART. 19 or an *infringement* of the Fundamental Right as guaranteed by that article. That would depend on the question whether ART. 19 is intended to confer rights which are *immune* from the taxing power of the State. If the article is based on and embedded in the assumption that it should not affect the taxing power of the State, then the rights conferred by the article necessarily are rights which are subject to the taxing power of the State. The imposition of taxes on the exercise of such rights, therefore, cannot mean the whittling down of the rights *as conferred by* ART. 19. The question is whether this is the true view of ART. 19.

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[5] 1952 Mad 395 (403) [AIR V 39] : ILR (1952) Mad 933 (DB), *Ananthakrishanan* v. *State of Madras*. (*Per Rajamannar C. J.* : Taxes must in greater or less degree affect the full enjoyment of rights like the right of property.)

[6] 1954 SC 403 (405) [AIR V 41 C 97] : 1954 SCR 1122 (SC), *Himmatlal* v. *State of M. P.*

The alternative to holding that the grant of Fundamental Rights under ART. 19 is not intended to affect the taxing power of the State is not that the State shall have no power to impose taxes in respect of the exercise of the rights conferred by the article, because such taxation can, in that event, be imposed by applying the provisions in cls. (2) to (6) of the article that reasonable restrictions in the interests of the general public can be imposed by law on the exercise of the Fundamental Rights guaranteed by cl. (1) of the article. Thus, whichever view is taken of the article there seems to be no constitutional impediment to the levy of reasonable taxes in public interest on the exercise of the rights conferred by the article.

But if a tax on the exercise of the Fundamental Right *cannot* pass the test of reasonable restrictions imposed in the interest of the general public permitted by cls. (2) to (6) of ART. 19, then the question will become material whether ART. 19 applies at all to the question of the validity of a taxing law and whether the rights conferred by the article are intended to affect the taxing power of the State. Apart from this, the question as to what is the true relation between the Fundamental Rights conferred by ART. 19 and the taxing power of the State, is an important one as it goes to the root of the whole conception of State power and sovereignty on which the Constitution is based.

(g) Above problem illustrated : Stamp duty on enrolment of Advocate if valid.

The above question arose in *Ananthakrishnan* v. *State of Madras*.[7] In that case, the levy of stamp duty under the Stamp Act on the enrolment of an Advocate was impeached as an unconstitutional invasion of the Fundamental Right to practise a profession conferred by ART. 19 (1) (g).

(h) Are Fundamental Rights under Art. 19 exempt from taxation ?

The Madras High Court rejected the contention questioning the validity of the Stamp Act in the above manner. But the learned Judges, composing the Bench that disposed of the case, adopted slightly different lines of reasoning. Rajamannar, C. J., was not quite so categorical and definite as the other learned Judge, Venkatarama Aiyar, J., as to the non-applicability of ART. 19 to such cases. While holding on the one hand that the Fundamental Rights were not exempt from the taxing power of the State, he also expressed the view that the particular tax in question before the Court came within the scope of the reasonable restriction in public interest authorised by ART. 19 itself (which implies that Fundamental Rights are exempt from taxation except to the extent permitted in the provision conferring the Fundamental Right). His view was that so long as the monetary exaction was, in

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7. 1952 Mad 395 [AIR V 39] : ILR (1952) Mad 933 (DB).

the opinion of the Court, reasonable, it cannot be said to be unconstitutional. He observed as follows :

> "It must be admitted that the State has got power to augment its revenues by the imposition of taxes. Taxes must in great or less degree affect the full enjoyment of rights like the right of property. Let me give an instance. ART. 19 (1) (f) confers on a citizen a right *inter alia* to dispose of property. But the Stamp Act imposes a duty on every disposition of property. As a citizen cannot lawfully dispose of his property by conveyance except on payment of the prescribed stamp duty, it may be said that to that extent there will be a restriction on the exercise of his freedom of disposition. But surely it cannot be contended that the levy of stamp duty on conveyances is unconstitutional. I am inclined to think that so long as the monetary exaction is, in the opinion of the Court, reasonable, it cannot be said that it is invalid as being unconstitutional. Suppose, for instance, the stamp duty levied on a conveyance of property amounts to 99 per cent. of its value then it may become the duty of this Court to hold that there is an unreasonable restriction on the exercise of the right of disposition."

(i) Reconciliation of Fundamental Rights under Art. 19 and taxing power of State.

It has already been stated above that his Lordship also held that the Fundamental Rights were not an *exception* to the taxing power of the State (which means that the Fundamental Rights could be taxed and the validity of the tax could not be examined under ART. 19). On the question of the reconciliation of the Fundamental Rights and the taxing power, he considered that so long as the taxing power was exercised within reasonable limits for legitimate revenue purposes it could not be questioned although it might adversely affect to some extent the exercise of the Fundamental Rights. On this aspect of the question, he observed as follows :

> "The question then is : how to reconcile the Fundamental Rights guaranteed under ART. 19 and the power to tax contained in several provisions of the Constitution? One way is to hold that a tax otherwise valid does not become invalid merely because it abridged any of the Fundamental Rights. This way is really not a way of reconciliation; it practically makes the Fundamental Rights entirely subject to the power of taxation. The other way is to hold any taxation of the exercise of the Fundamental Right which aims at unduly abridging or destroying such right as unconstitutional (vide *Grosjean's case*[8]). But if the taxation is only for legitimate revenue purpose, then, it is not invalid merely because it may adversely affect any of the Fundamental Rights. This way of reconciling would leave room for judicial review in exceptional cases

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[8] (1936) 297 U. S. 233 : 80 Law Ed. 360, *Grosjean* v. *American Press Co.*

and a power in the Court to declare a particular instance of taxation as unconstitutional.

> "In this case it is not even suggested that the object of levying the stamp duty on the enrolment entry is to deliberately abridge or destroy the right to carry on the legal profession. It was also not suggested that the stamp duty is so excessive and oppressive as to virtually abridge or destroy such right. It must, therefore, be held that the stamp duty leviable in this case is proper and constitutional."

(j) Fundamental Rights under Art. 19 not exempt from taxation power.

The other learned Judge, Venkatarama Aiyar, J., took a more definite stand on the question of the non-applicability of ART. 19 to such cases. He held that the Fundamental Rights granted by the Constitution were not immune from the taxing power of the State which was an attribute of its sovereignty. (The implication of this is that the validity of the taxing law could not be examined under ART. 19). He observed as follows (at page 405 of A. I. R. 1952 Mad.) :

> "Does the favoured position granted to the Fundamental Rights carry with it any immunity from taxation ? The right to levy tax is an incident of sovereignty and the Legislatures as sovereign bodies have plenary powers of taxation subject only to such limitations as may be prescribed by the Constitution and nowhere in the Constitution do we find any prohibition against taxation of Fundamental Rights. Part III does not contain any such inhibition. On the other hand, there are provisions in PART XII of the Constitution, which clearly recognise the existence of such powers. Article 269, cl. (1) provides that certain duties and taxes shall be levied and collected by the Government of India and assigned to the States in the manner provided and one of such taxes is 'taxes other than stamp duties on transactions in stock exchanges and future markets.' (ART. 269 (1) (e)) Article 276 is very important for this purpose. Article 276, cl. (1) enacts that no law of the Legislature of a State in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income. Article 276, cl. (3) provides that the power of the State Legislature to impose profession tax shall not be construed as in any way limiting the power of the Parliament to impose taxes on incomes. Here is a plain distinction made between profession tax and tax on income earned in the profession and provision is made for imposition of both classes of taxes. Then turning to the Seventh Schedule we find in the Union List No. 1, Entry No. 90 'Taxes other than stamp duties on transactions in stock-exchanges and future markets'; and in the State List, No. 2, Entry No. 60 'Taxes on professions, trades, callings and employments.' These provisions establish beyond all doubt that it was the

> intention of the Legislature to confer on the appropriate legislative bodies power to impose profession tax."

Further in the same judgment, he observed after discussing a number of American decisions and after referring to the judgment of the Supreme Court in *Ramji Lal* v. *Income-tax Officer*:[9]

> "Thus there is abundant authority for the proposition that Fundamental Rights are not immune from taxation."

Again, he observed (at p. 408 of A. I. R.) :

> "The power to tax is an attribute of sovereignty; it carries with it the power to determine when and how the tax shall be levied and it is no objection to its validity that it is levied before the commencement of the trade and not after. The theory of previous restraint has no application to laws of taxation. The result then is that the Stamp Act being a measure of taxation must be held to be constitutional and valid."

It is submitted with respect that the view taken by Venkatarama Aiyar, J., is fundamentally sound, having regard to the nature of the taxing power of the State as one applicable to all persons who are subject to the sovereignty of the State and the obligation of such persons to provide the wherewithal for the maintenance and conduct of the State.[10] It could not have been the intention of the

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[9] 1951 SC 97 [AIR V 38 C 11] : 1951 SCR 127 (SC).

[10] 1952 Pat 359 (366) (Pr 17) [AIR V 39] : ILR 31 Pat 493 (SB), *Atma Ram* v. *State of Bihar*. (*Taxation is not a restraint on trade unless* it is discriminatory in its character and is levied with the object of helping one person or party against the other. The Court will, therefore, be reluctant to declare a taxing statute unconstitutional merely because it is claimed that the legislation may result in some kind of interference with trade or commerce which may be indirectly the unavoidable consequence of all taxing statutes. If the subject of the legislation is within the taxing authority of the legislature concerned, that should be sufficient to sustain it.)

[*See also* (1937) 300 U. S. 506 (513, 514) : 81 Law Ed. 772, *Sonzinsky* v. *United States*. (A tax laid by the Congress is not any the less a tax because it has a regulatory effect; and an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed.

Inquiry into hidden motives which move Congress to exercise the power constitutionally conferred upon it is beyond the competency of courts; and they will not undertake, by collateral inquiry as to the measure of regulatory effect of a tax to ascribe congress an attempt, under the guise of taxation, to exercise another power denied by the federal constitution.)

(1933) 289 U. S. 48 (58, 59) : 77 Law Ed. 1025, *University of Illinois* v. *United States*. (It is true that the taxing power is a distinct power; that it is distinct from the power to regulate commerce. It is also true that the taxing power embraces the power to lay duties

Constitution-makers to affect this fundamental obligation of the citizen by the special protection extended to certain rights by the Constitution.

It has been already stated that Rajamannar, C. J., also was inclined to agree with Venkatarama Ayyar, J., in the above, although he also proceeded on the basis that the tax in the particular case satisfied the requirements of ART. 19.

(k) Taxation otherwise than under valid law may be infringement of Fundamental Right under Art. 19.

But where the State attempts to recover a tax under an *invalid* law and such tax affects the exercise of a Fundamental Right under ART. 19, there would be an infringement of the Fundamental Right *under that article.* Thus, where sales-tax is sought to be recovered under a Sales-tax Act which is invalid and *ultra vires* under ART. 286, there would be a violation of the assessee's Fundamental right under ART. 19 (1) (g) to carry on business, and he can apply for the enforcement of such right under the Constitution. This position is now clearly established on the authority of decisions of the Supreme Court.[11] Similarly, where the assessment of sales-tax is not according to the governing Sales-tax Act, there would be an infringement of the Fundamental Right under ART. 19 (1) (g) to carry on business.[12] But it will be noted that in all such cases, the validity of the sale-tax *law* is not being questioned as an infringement of the Fundamental Right under ART. 19 and the basis of the decisions is not that the sales-tax *law* in question is invalid as it restricts a Fundamental Right guaranteed by ART. 19 beyond the limits permitted under that article. Hence, they do not affect the question whether a taxing law which is otherwise valid can be questioned on the ground that the tax imposed by it operates as a restriction of a Fundamental Right granted by ART. 19. Thus, the decisions of the Supreme Court, above mentioned, do not affect the correctness of the view submitted above that the Fundamental Rights under ART. 19 are not immune from the taxing power of the State under this article. Otherwise,

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But because the taxing power is a distinct power and embraces the power to lay duties, it does not follow that duties may not be imposed in the exercise of the power to regulate commerce.)]

[11] 1955 SC 661 (669) (Pr 5) [AIR V 42 C 101] : (1955) 2 SCR 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

1954 SC 403 (405) (Pr 9) [AIR V 41 C 97] : 1954 SCR 1122 (SC), *Himmatlal Harilal* v. *State of M. P.*

1953 SC 252 (256) [AIR V 40 C 62] : 1953 SCR 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

[*See* 1954 SC 311 (312) (Pr 2, 3) [AIR V 41 C 73] : 1954 SCR 955 (SC), *Soma Singh* v. *State of Pepsu.* (Application under Art. 32 was entertained though dismissed on merits.)]

[*See also* 1952 SC 115 (117) (Pr 7) [AIR V 39] : 1952 SCR 572 (SC), *Mohammad Yasin* v. *Town Area Committee, Jalalabad*].

[12] 1955 Mad 363 (365) (Pr 5) [AIR V 42 C 96] (DB), *Mehta Bros* v. *Secretary (Commercial Taxes) B. R.*

the position would be that Courts would be entitled to question under ART. 19 the validity of taxing statutes on the ground that they are "unreasonable" and not in the "public interest"—questions which are meant entirely for the Legislature to consider and are not within the purview of the functions of a court. (See NOTE 5.) But all that is meant by saying that Fundamental Rights are not immune from the taxing power of the State is that so long as there is a valid law of the Legislature, under the authority of which the tax is being levied and collected, the validity of the tax cannot be questioned on the ground that it operates as a restriction of a Fundamental Right granted by ART. 19. For, the taxing power of the State is the power conferred by this article, namely, to levy and collect taxes under the *authority of law*. When this authority of law is absent, as when the taxing statute is *ultra vires* or the taxation is not according to law, an attempt on the part of the State to recover the tax would not be in exercise of its taxing power under the Constitution at all and in such a case, if the tax in question tends to restrict Fundamental Right granted by ART. 19, it would not be the *taxing power* of the State that would be restricting the Fundamental Right, but such restriction would be the result of an unconstitutional exercise of a *non-existent* power by the State against a citizen and in such a case, the argument that the Fundamental Rights under ART. 19 are not immune from the taxing power of the State has no applicability.

(1 Constitutional guarantee does not mean immunity from taxation: Another example.

In this connection it is relevant to refer to another matter which also illustrates that the constitutional guarantee of any right does not mean *immunity* from taxation in respect of that right. The commentary on ART. 125 relating to the salaries of the Judges of the Supreme Court, which are constitutionally guaranteed, discusses the question whether such salaries are exempt from income-tax. It will be found in the commentary that such a question has also arisen under the American Constitution and it is now the settled view there that such salaries are not exempt from income-tax although they are constitutionally guaranteed. Thus, the mere fact that the Constitution extends its protection to a certain matter does not mean the *exemption* of such matter from taxation.

(m) Freedom of inter-State trade.

(m) Freedom of inter-State trade and commerce and power of taxation.

See Notes on ART. 301.

(mm) Tax on constitutional rights.

(mm) Limit to taxation power when it affects constitutionally protected rights.

But then the question arises whether there is any limit to the taxing power of the State in so far as any tax may bear upon or may operate as a restriction on a Fundamental Right under ART. 19 or on other constitutionally protected right.

(n) Taxing laws classified for above purpose.

In regard to this question, taxing laws may be considered from two points of views: (i) whether the law is *deliberately intended* to operate as a check on a certain human activity, the right to engage in which is constitutionally guaranteed; (ii) whether it is not so *intended* but is calculated in the very nature of things to have the *effect* of restricting to a greater or less extent, the exercise or enjoyment of a Fundamental Right.

(o) Taxing laws which are not purely fiscal statutes are subject to Art. 19.

In the *former* case, the taxing law, it will be seen, has a double aspect—a fiscal and a regulatory one. The taxing power, which is not intended to be affected by the grant of Fundamental Rights, must be assumed to be one exercised purely for a *fiscal* purpose, that is, for the purpose of raising revenue for the State. When the taxing power is employed as a means not only for raising revenue but also as an indirect check on a certain kind of activity which is protected under ART. 19, the exercise of taxing power takes on also the character of a regulatory power or police power to that extent, and will come within the purview of that article.

Hence, in such a case the law imposing the tax will be void unless the Court finds it to be a reasonable restriction imposed in the interests of the general public.

Thus, where the law requires a licence for carrying on a trade and imposes a licence fee for the grant of a licence, the law is both a taxing measure and a regulatory measure, and in so far as it is a regulatory measure it is open for examination by the Court under ART. 19 from the point of view of its being reasonable and in the interests of the general public.[13] (See ART. 19, NOTE 76.) As was

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[13] 1952 SC 115 (117) (Pr 7) [AIR V 39 C 22] : 1952 SCR 572 (SC), *Mohammad Yasin* v. *Town Area Committee, Jalalabad.*

[*See* 1954 Madh-B 196 (201) (Pr 15) [AIR V 41 C 87] (DB), *Gwalior Sugar Co. Ltd.* v. *State of Madhya Bharat.* (Licence fee affects fundamental right as it means that the trade cannot be carried on unless the licence is taken but 'cess' is only a special tax and does not operate as restraint on fundamental right.)]

1954 Raj 178 (Pr 10) [AIR V 41 C 54] : ILR (1954) 4 Raj 982 (DB), *Maharaja Shri Umaid Mills Ltd.* v. *State of Rajasthan.* (Licence fee levied under Factories Act is not an unreasonable restriction on fundamental right under Art. 19 (1) (g) and is a very reasonable restriction.)

1954 Trav-Co 504 (509) (Pr 9) [AIR V 41 C 176] : ILR (1954) Trav-Co 806, *Narayana Pillai* v. *State of Travancore-Cochin.* (Rules under Abkari legislation imposing licence fee, gallonage fee, and limit of quantity of liquor saleable at a time to non-licensees are *intra vires* and *are reasonable restrictions* on the freedom of trade under Art. 19 (1) (g). All the tests mentioned in AIR 1953 Mad 476 (478) by which reasonableness of restriction is measured, operate to uphold the impugned rules.)]

[*See also* 1942 All 156 (166) [AIR V 29] : 43 Cri L Jour 674, *Emperor* v. *Munnalal.* (Govt. has power to regulate industry and put it under pointed out by the Supreme Court in *Mohammad Yasin* v. *Town Area Committee, Jalalabad,*[14] a licence fee for carrying on a business necessarily imports a restriction on the right to carry on a business because in the absence of a licence the business cannot be carried on at all.

(p) Purely fiscal statutes.

In the *second category* of cases above postulated that is, those in which there is no deliberate intention on the part of the Legislature to restrict by taxation any activity, it is clear that the law must be treated as a purely fiscal measure and not in any way as a regulatory measure, although it may mean, in some cases, to a greater or less extent restriction on a certain kind of activity.

Thus, for instance, the imposition of stamp duty on the enrolment of an advocate may not be *intended* by the Legislature to discourage persons from getting enrolled as advocates. Nevertheless, inasmuch as a person cannot get enrolled unless and until he pays the stamp duty, the requirement of stamp duty does mean a check on the exercise of his right to be enrolled (assuming him to have such a right). Similarly, the imposition of a stamp duty on a conveyance may not be *intended* by the Legislature to discourage and put a check on transfers of property. But inasmuch as an effective conveyance cannot come into existence unless the required stamp duty is paid, the imposition of stamp duty to that extent must be regarded as restricting the right to dispose of one's property guaranteed under cl. (1) (f) of ART. 19.

But a profession tax or an occupation tax, pure and simple, would only mean a financial liability for the tax payer. Similarly, it may be said that a tax like the income-tax or the sales-tax is neither *intended* as a check nor has the *effect* of operating as a check on any activity as such.

Thus, the second category of cases postulated above, itself embraces two types of cases: One in which without paying the tax a certain act cannot be done at all and another, in which there is no such restriction but a mere financial liability attaches.

(q) Purely fiscal measures are outside purview of Art. 19.

In either case, the taxation measure will be a purely *fiscal* one, and on the principle already discussed, namely, that purely fiscal measures must be deemed to be outside the purview of ART. 19, the type of laws mentioned in the second category will not be regarded as a restriction of the Fundamental Rights conferred by that article and hence the validity of such laws will not be open to question as violating the provisions of ART. 19.

But the question arises whether the taxing power of the State is *unlimited* in such cases or whether there is any limit to such power.

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licence and charge licence fee — There is no *absolute* right to carry on industry)].

[14] 1952 SC 115 (116) (Pr 5) [AIR V 39 C 22] : 1952 SCR 572 (SC).

In this connection it must be remembered that the second category of cases comprises (as already mentioned) two kinds of cases: (i) those in which the legislation has an *effect* of curbing the exercise of a Fundamental Right, and (ii) those in which the legislation has no such effect. But even in the latter class of cases, it is undeniable that the *enjoyment* of the right must be affected to a greater or less extent. Thus, a profession tax does not mean that a person is *prevented* from practising a profession if he does not pay the tax, in the sense that a person is prevented from becoming an Advocate if he fails to pay the stamp duty on his enrolment. But it is clear that the profession tax is a burden on the right to practise the profession and affects its enjoyment.[15] Hence, the question arises whether *even purely fiscal measures* are subject to any limitation in so far as they may affect Fundamental Rights, and if so what that limitation is.

It has already been stated that ART. 19 must be held not to apply to such laws and so, it is irrelevant to refer to cls. (2) to (6) of that article in this connection and say that such laws will be valid if the 'restrictions' that they imply are reasonable and in public interest under those clauses. Hence, the question must be considered *de hors* the provisions of those clauses.

(r) Limitation apart from Art. 19 : Taxing power not to be used to destroy fundamental Rights.

On this question, Venkatarama Aiyar J. in *Ananthakrishnan* v. *State of Madras*,[16] already referred to, has provided a tentative answer. His Lordship indicated his inclination to accept the view that even purely fiscal laws must not be allowed to unduly affect the Fundamental Rights granted by the Constitution. His ground is not, as already stated, that Fundamental Rights are intended to be above taxation or that they constitute an *exception* to the taxing power of the State. His ground is that there is implicit in the Constitution a limitation on the taxing power of the State by reason of the fact that the Fundamental Rights have been granted by the same organic instrument. He observed as follows in regard to this aspect of the question:

> "But it is open to argument that when the Constitution which confers the power of taxation also confers certain Fundamental Rights the former should be so exercised as not to destroy the latter. The contention that the power to tax is the power to destroy has been rejected in so far as it seeks to negative any power to tax Fundamental Rights but it does not follow that it should be rejected in so far as it seeks to impose a limitation upon that power, namely, that it should not be exercised so as to destroy them. As already pointed out there is a difference between profes-

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[15] *See* observations of Venkatarama Ayyar J., in *Ananthakrishnan* v. *State of Madras*, 1952 Mad 395 (408) [AIR V 39 C 105/35] : ILR (1952) Mad 933 (DB).

[16] 1952 Mad 395 [AIR V 39 C 105/35] : ILR (1952) Mad 933 (DB).

sion-tax and income-tax. The power of levying a tax on income is absolute and if the Legislature chooses to levy a tax of fifteen annas in the rupee on that income Courts will have no jurisdiction to declare it unconstitutional on the ground that it is unreasonable. But a right to carry on business is a Fundamental Right protected by the Constitution and it stands to reason that a tax on such a right should not be such as to destroy it—as for example—a profession tax equal or nearly equal to the income earned in the previous year. It might well be contended that there is in such cases a limitation on the powers of taxation, implicit in the Constitution itself, that it should not be exercised in such a manner as to take away with one hand what has been given by the other. If this is the correct position it will follow that while the levy of income-tax cannot be questioned in Courts, the levy of profession-tax might be challenged on the ground that it is so unreasonable and excessive as to be prohibitive of the right to carry on trade. Any question whether a tax in a particular case is so unreasonable as to amount to a destruction of the rights will, of course, be a matter for determination by Courts, in the same manner as questions of reasonableness of restrictions under ART. 19, sub-cls. (3) to (5)."

Then, after citing American decisions in support of his view, he concluded as follows:

"Thus notwithstanding the recognition of the rule that powers of taxation are absolute subject only to limitations contained in the Constitution, these passages would seem to recognise the principle that in the case of 'constitutionally protected rights' the reasonableness of the tax and whether it is calculated to destroy the rights are matters open to judicial review.

"No question has been raised in this case that the duty is such as to destroy the right and it is, therefore, unnecessary to consider it further."

It has already been seen above that Rajamannar, C. J. has held that Fundamental Rights under ART. 19 can be the subject of taxation within reasonable limits, by virtue of ART. 19 itself. From the quotation from his judgment, which has already been given, it will also be seen that he took the view that even on the footing that Fundamental Rights are not intended to be an exception to the taxing power of the State (which means that tax laws cannot be examined as to their reasonableness or otherwise, under ART. 19), such power is not an unlimited one and that it cannot be used in such a way as to rob the Fundamental Rights of all their value.

In *Ananthakrishnan* v. *State of Madras*,[17] the stamp duty in question was found by the Court to be a reasonable levy and did not unduly interfere with any Fundamental Right under ART. 19. Hence, the question whether the taxing power of the State was not subject to any limit whatsoever even where it might affect Fundamental Rights, did not arise for decision and hence there is no definite pronouncement on this question, and the views expressed have a tentative tone. But, with respect, it would appear that the line indicated in the above case affords a solution of the problem of reconciling the two conflicting principles, namely, Fundamental Rights of the subjects and the taxing power of the State, which is in consonance with the accepted principle of the construction of statutes that the different provisions of an enactment must receive a harmonious construction, so as to give effect to them all as far as possible and to see that none of them is reduced to a nullity or a dead letter.

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[17] 1952 Mad 395 [AIR V 39 C105/35] : ILR (1952) Mad 933 (DB).

(s) Harmonious construction of constitution.

In this connection, reference may be made to the commentary on ART. 246, NOTE 8 relating to the interpretation of the entries in the Legislative Lists, where it is pointed out that they must be so construed that as far as possible effect is given to them all without rendering any of them nugatory. Especially the following quotation from *Citizens Insurance Co. of Canada* v. *Parsons*[18] is apposite :

> "In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each Legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other."

So, the result is : Although the Fundamental Rights granted under ART. 19 are intended only to operate subject to the taxing power of the State and the provisions of that article are not intended to supersede such power, yet, the Fundamental Rights operate *indirectly* as a limitation on the taxing power by reason of the principle, already adverted to, that no part of the Constitution can be so construed as to render nugatory any other part thereof. Thus, the limitation imposed upon the taxing power by the creation of Fundamental Rights is that the taxing power shall not be exercised in such a way as to render nugatory the Fundamental Rights. Courts have, therefore, to assume the power to determine when a Fundamental Right can be said to be rendered nugatory by the exercise of the taxing power. When the effect of a certain tax is, in the opinion of the Court, to unreasonably interfere with the exercise of a Fundamental Right, the taxing power can be said to render nugatory such Fundamental Right. Hence, the excessive use of the taxing power to the detriment of a Fundamental Right will be unconstitutional. The size and amount of the tax will be material considerations in determining whether it makes the exercise of a Fundamental Right prohibitive and robs it of its value beyond all reasonable limits.

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[18] (1881) 7 App Cas 96 : 51 LJ PC 11.

See also ART. 19, NOTES 20 (d), 76 and 85.

(t) American law is similar—Due process clause does not confer exemption from taxing power.

The above principles also receive support from American decisions. Thus, it has been held there that the 'due process clause' (Amendments V and XIV), which corresponds to ARTS. 19, 21 and 31 of this Constitution, does not import an exemption from the taxing power of the State exercised in a normal and legitimate manner and in the usual course.

Thus, in *Brushaber* v. *Union Pacific Railroad Co.*,[19] it was observed that it was well settled that the due process clause of the 5th Amendment "is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring, upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process clause."

But in the same case it was observed :

> "This doctrine would have no application in a case where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property; that is, a taking of the same in violation of the 5th Amendment; or what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

For similar observations see *A. Magnano Co.* v. *Hamilton.*[20] So also, in *Jones* v. *Opelika*,[21] it was held that the constitutional guarantee of freedom of religion does not require from the State a subsidy in the form of exemption from taxation, and the principle was again affirmed that constitutional rights are not absolute rights existing independently of other privileges protected by the same organic instrument. In *Grosjean* v. *American Press Co.*[22] a taxing law was condemned and declared *ultra vires* on the ground that it was not a *bona fide* measure of taxation for raising public revenue but one deliberately imposed for the purpose of injuring a certain group of newspapers and was thus an unwarranted restraint on the freedom of the Press. References for further American authorities may be obtained from the judgments in *Ananthakrishnan* v. *State of Madras.*[23]

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[19] (1916) 60 Law Ed 493 (504) : 240 US 1 (24, 25).

[*See also* (1927) 71 Law Ed 1184 (1193) : 274 US 531 (542, 543), *Nichols* v. *Coolidge*. (A statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the 5th Amendment. Case law Ref.

So much of S. 402C, Revenue Act of 1919 as requires that there shall be included in the gross estate of a descendant for purposes of estate taxation the value of property transferred by descendant prior to its passage, merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary and capricious, amounts to confiscation, and violates the constitutional prohibition against taking property without due process of law.)]

[20] (1934) 292 US 40 (44, 47) : 78 Law Ed 1109.

[21] (1942) 86 Law Ed 1691 (1702) : 316 US 584 (599).

(u) Validity of taxation laws affecting Fundamental Rights under Art. 19 is independent of provision allowing reasonable restriction of Fundamental Right.

It is worth noting that the due process clause in the American Constitution does not contain any express provision similar to those of cls. (2) to (6) of ART. 19, from which it could be argued that whatever limitation on the constitutional right conferred by the due process clause is involved in its subjection to taxation in the usual course is provided for expressly in the Constitution itself as part and parcel of the scheme of constitutional rights imparted by it. This is important to emphasize the real basis of the view submitted above, namely, that the Fundamental Rights granted by ART. 19 are not intended to affect the legitimate normal taxation activity of the State, although such activity will have to take note of the fact that the Constitution has also granted Fundamental Rights which must be allowed to be reasonably effective within their own orbs. Even in the absence of cls. (2) to (6) of ART. 19 expressly permitting reasonable limitations in public interest of the Fundamental Rights granted by cl. (1), the taxing power would have had its legitimate play on the Fundamental Rights. So also, even in the absence of the express provision that the restriction of a Fundamental Right must be reasonable and in public interest, a limitation on the exercise of the taxing power in respect of the Fundamental Rights would have sprung from the principle that the provisions of the Constitution must not be allowed to destroy each other.

Apart from this, it is also to be noted that the standard of reasonableness when applying the provisions of cls. (2) to (6) to restrictions other than those involved in taxation will not be the same as those adopted in judging of the reasonableness of taxation measures as tending to destroy the Fundamental Rights. It is conceived that necessarily Courts are bound to treat taxation measures as on a special footing and to allow a much wider latitude to them even if they should adversely affect Fundamental Rights than to restrictions imposed under the police power or regulatory power of the State.

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[22] (1936) 80 Law Ed 660 (669) : 297 US 233 (250).

[23] 1952 Mad 395 [AIR V 39 C 105/35] : ILR (1952) Mad 933 (DB).

Hence, the position that Fundamental Rights are not exempt from the power of taxation of the State but that such power will have to be exercised within limits and cannot be allowed to snuff out the Fundamental Rights is not identical with the position that would result if taxation is regarded as an ordinary restriction coming within the purview of ART. 19.

(v) Retrospective taxing law valid.

A retrospective taxing law is not liable to be questioned as an *ex post facto* law which is prohibited under ART. 20. (See NOTE 8.)

(w) Compelling assistance in collection of tax-Validity.

Under ART. 23, cl. (2), the State has power in a taxing statute to require assistance in the collection of the tax. Thus, where a tax is imposed on passengers in motor buses, the bus owners may be required to collect the tax and pay it over to the Government.[24]

(See also NOTES 7 and 8 and ART. 19, NOTES 20, 76 and 85.)

6a. Freedom of inter-state trade, commerce and intercourse and power of taxation. — See NOTE 6 (m) and ARTS. 301 and 304 and commentary thereon.

7. Taxation and equality before the law. — Taxation laws are as amenable to the equality clause in ART. 14 as any other law.[1] By the same token, the principle of reasonable classification, which is included in the doctrine of equality, is also applicable to laws of taxation.[2]

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[24] 1952 Pat 359 (366) (Pr 16) [AIR V 39] : ILR 31 Pat 493 (SB), *Atma Ram* v. *State of Bihar.*

Article 265 — Note 7

[1] 1954 Madh-B 196 (202) [AIR V 41 C 87], *Gwalior Sugar Co. Ltd.* v. *State of Madhya Bharat.* (Cess on sugar factory was held to be bad as offending Art. 14).

[2] 1951 SC 97 (100) [AIR V 38 C 11] : 1951 SCR 127 (SC), *Ramji Lal* v. *The Income Tax Officer, Mohindar Garh.*

1954 Bom 261 (265) (Pr 14) [AIR V 41 C 76] : ILR (1954) Bom 647 (DB), *Cantonment Board, Poona* v. *Western India Theatres Ltd.* (So far as taxation is concerned, classification is always permissible. Not only does the Constitution permit taxation being related to the capacity to pay, but it is obvious that it is always desirable that it should be so related. Hence, the contention that taxes levied on a cinema show are *ultra vires,* on the ground that they offend against Art. 14 of the Constitution cannot be accepted. The contention was that the Cantonment Board was not entitled to levy entertainment tax at West End and Capitol Cinemas at rates different from those leviable at other cinemas — Contention overruled).

1954 Madh-B 196 (202) (Pr 17) [AIR V 41 C 87] (DB), *Gwalior Sugar Co. Ltd.* v. *State of Madhya Bharat.* (Where the receipts of the cess were credited in the general revenues and not earmarked for promoting the object with which it was levied, it cannot be said that the cess was imposed for conferring some special benefit; it becomes virtually a tax and the *quid pro quo* element on which reasonable classification can be based ceases to exist. AIR 1954 SC 282 (SC), Foll. Taxation according to capacity to pay does not offend Art. 14.)

The equality clause inculcates equality not only in regard to substantive rights but also in regard to procedural matters.[3] Hence, where a law prescribes a procedure in regard to the investigation leading to the assessment of a certain class of persons and such procedure is of a discriminatory nature and involves the denial of several advantages available under the procedure applicable to another class of assessees, while in the opinion of the Court there is no reasonable ground for such discrimination, the provisions under which such discriminatory procedure is prescribed, will be void as offending the equality clause.[4]

1954 Raj 178 (Pr 7) [AIR V 41 C 54] : ILR (1954) 4 Raj 982 (DB), *Maharaja Shri Umaid Mills Ltd.* v. *State of Rajasthan.* (Licence fees for factories levied under sliding scale according to horse power and men employed not bad).

(1934) 78 Law Ed 1109 (1113) : 292 US 40 (43), *A Magnano Co.* v. *Hamilton.* (Classification for taxation purposes not bad — Differences between butter and oleomargarine are sufficient to justify their separate classification for purpose of taxation. A tax designed to be expended for a public purpose does not cease to be one levied for that purpose because it has the effect of imposing a burden upon one class of business enterprises in such a way as to benefit another class).

(1916) 60 Law Ed 493 (504) : 240 US 1 (23, 24), *Brushaber* v. *Union Pacific Railroad Co.* (No unconstitutional discrimination and want of due process result because owners of houses in which they live are not compelled by Income Tax law to estimate the rental value in making up their incomes, while those who live in rented houses are not allowed in making up their taxable income to deduct the rent which they have paid, nor because of the fact that although family expenses are not as a rule permitted to be deducted from gross income, farmers are permitted to omit from their income return certain products of the farm which are susceptible of use by them for sustaining their families during the years).

[*See* 1942 All 156 (166) [AIR V 29] : 43 Cri L Jour 674, *Emperor* v. *Munna Lal.* (Special tax to cover special expenditure incurred for benefit of a certain class is not bad)].

[3] 1955 SC 13 (19) [(S) AIR V 42 C 5] : 1955 SCR 787 (SC), *Meenakshi Mills* v. *Visvanatha Sastry.*

1954 SC 545 (552) [AIR V 41 C 126] : 1955 SCR 448 (SC), *Surajmal Mohta & Co.* v. *A. V. Visvanatha Sastry.* (It is well settled that in its application to legal proceedings Art. 14 assures to every one the same rules of evidence and modes of procedure).

[4] 1955 SC 13 (19) [(S) AIR V 42 C 5] : 1955 SCR 787 (SC), *Meenakshi Mills* v. *Visvanatha Sastry.* (Section 5(1) of Taxation on Income (Investigation Commission) Act 30 of 1947 held to be void as offending Art. 14 as it made applicable the drastic provisions of the Act to persons who fell in the same class as those to whom the Income Tax Act, S. 34 as amended by Indian Income Tax Amendment Act 33 of 1954 was applicable).

1954 SC 545 (554) [AIR V 41 C 126] : 1955 SCR 448 (SC), *Surajmal Mohta & Co* v. *A. V. Visvanatha Sastry.* (Section 5(4) of Taxation on Income (Investigation Commission) Act 30 of 1947 held to be void as offending Art. 14 as it made applicable the drastic provisions of the

But when the investigation is complete, the fact that the investigation was held under such unconstitutional provisions of law, will not make the assessment itself open to impeachment as a violation of the equality clause, and if remedy is sought against the assessment, it will only be on the ground of the unconstitutionality of the previous investigation resulting in assessment and not on the ground that the assessment itself constitutes a violation of the equality clause. In such a case, therefore, the real complaint can only be that a person is being taxed as a result of an investigation held under a law which is bad as offending against ART. 14. In other words, the complaint can only be that the tax is sought to be recovered without the authority of a valid law under this article, so that the right sought to be enforced will be one under this article and not the right under ART. 14. Thus, in *Laxmanappa Hanumantappa* v. *Union of India*,[5] the Supreme Court declined to interfere under ART. 32 in the case of an assessment in consequence of proceedings started under the Taxation on Income (Investigation Commission) Act (1947) on the ground that the investigation had been finished long before the application to the Court attacking the validity of the above Act as contravening ART. 14. In this connection reference may also be made to the observations of the Supreme Court in *Nain Sukh Das* v. *State of Uttar Pradesh*,[6] where the Supreme Court observed :

> "Thus, the infringement of their (petitioners') Fundamental Rights under ART. 15 (1) and ART. 14, that is, the discrimination practised against them, of which they now complain related to rights which they, in fact, never sought to exercise and took no steps to assert, while there was still room for doing so and for the exercise of which the opportunity is now lost."

See also ART. 14, NOTE 17 and ART. 286, NOTE 19.

8. Retrospective taxing clause. — As seen in NOTE 12 on ART. 245, a Legislature with plenary powers, like the Parliament and the State Legislatures, is entitled to make laws with retrospective effect, although it will be a question of construction whether a certain law has retrospective operation or not. There is, however, one exception to this rule, namely, that the Legislature is competent to make laws with retrospective effect. (This exception is contained in ART. 20 of the Constitution, which prohibits the enactment of what are known as *ex post facto* laws, that is, laws which declare acts and omissions to be offences, which acts and omissions were not offences under the law in force at the the time when they were committed. The Constitution only prescribes one limitation on the power of the

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Act to persons who fell in the same class as those to whom the Income Tax Act, S. 34 was applicable).

[5] 1955 SC 3 (4) [(S) AIR V 42 C 2] : 1955 SCR 769 (SC).

[6] 1953 SC 384 (385) [AIR V 40 C 86] : 1953 SCR 1184 (SC).

Legislature to enact retrospective laws and that is the limitation contained in the above provision of ART. 20. Hence, there is no constitutional bar to the enactment of taxing laws with retrospective effect[1] as taxing laws are not penal laws creating and providing for the punishment of offences. See also ART. 19, NOTE 85 and ART. 245, NOTE 12.

9. Double taxation. — There is nothing in the Constitution which prevents double taxation being levied. Instances are not wanting in this country in which taxes are levied twice upon the same thing, once for the benefit of the State Government and in the second instance, for the benefit of the local self-government bodies, for example, the District Local Board or the Municipality.[1]

10. Remedies for illegal taxation. — In addition to the normal remedy of suit which a person has under the law for vindicating his rights in case of illegal taxation, the Constitution gives him special remedies by way of writ applications to the Supreme Court under ART. 32 and to the High Court under ART. 226. But the conditions under which these writs are available are not the same in regard to ART. 32 as in regard to ART. 226. Article 32 will only apply where the relief sought is the enforcement of a *Fundamental* Right. Where the relief sought is not the enforcement of a Fundamental Right but only the enforcement of a right which this article confers against being taxed otherwise than under the

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Article 265 — Note 8

[1] 1953 Mad 337 (339, 340) (Prs 7, 9) [AIR V 40 C 114] : 1953 Cri L Jour 625, *Public Prosecutor* v. *Ayyapan Pillai.* (*Held,* amendment providing a new mode of recovery of Sales Tax, viz., "as if it were a fine" did not offend the rule against *ex post facto* laws in Art. 20).

1952 Nag 139 (Prs 12, 13) [AIR V 39] : ILR (1952) Nag 156 (DB), *Chhotabhai Jethabhai Patel & Co.* v. *Union of India.* (If Parliament has power to enact a law retrospectively the nature of the tax is not altered by the mere fact that the rate is increased retrospectively).

Article 265 — Note 9

[1] 1954 Bom 261 (265) (Pr 13) [AIR V 41 C 76] : ILR (1954) Bom 647 (DB), *Cantonment Board, Poona* v. *Western India Theatres Ltd.* (Entertainment tax on cinema theatres once by State Govt. and again by Cantonment Board. It is quite true that ordinarily if Provincial Legislature wants to levy for itself a tax it would not pass two laws levying two different duties in respect of same subject-matter (to wit in this case, an entertainment). But there are several instances of such taxes e.g. land revenue and local fund cess and urban proprietary tax levied in City of Bombay for purpose of Provincial Govt. and house tax which is levied by Municipality of Bombay for its own finances).

1945 Nag 171 (175) [AIR V 32] : ILR (1945) Nag 134 (DB), *Mulji Sicka & Co.* v. *Dist. Council, Bhandara.* (Section 51, C. P. Local Self-Govt. Act (4 of 1920) which is a section for general taxation does not exclude a terminal tax).

authority of a valid law an application under ART. 32 will not lie[1] but one under ART. 226 will lie.[2] The right, which this article confers, of not being taxed except under authority of a valid law is not a Fundamental Right as the article is not included in PART III of the Constitution. Even assuming that taxation is a form of deprivation of property in regard to which a Fundamental Right is created under Art. 31, inasmuch as a special provision has been made in this article regarding taxation, the right infringed in the case of illegal taxation is only a right under this article and not a right under ART. 31. Hence, in such cases, as already stated, the Supreme Court cannot be moved under ART. 32 although a writ application to the High Court under ART. 226 can be made.

But this does not mean that under no circumstances an application to the Supreme Court under ART. 32 will lie in a matter relating to taxation. Where a law relating to taxation infringes any of the Fundamental Rights an application to the Supreme Court will lie for the enforcement of such right, although the law is one which pertains to taxation. Thus in *Surajmal Mohta* v. *A. V. Visvanatha Sastri*[3] and *Meenakshi Mills* v. *A. V. Visvanatha Sastri*,[4] the provisions of Taxation on Income (Investigation Commission) Act, (30 of 1947), which introduced a special procedure for investigation of alleged cases of tax evasion, different from and more drastic than those of the Income-tax Act, were held to offend against ART. 14 of

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Article 265 — Note 10

[1] 1955 SC 3 (4) (Pr 5) [(S) AIR V 42 C 2] : 1955 SCR 769 (SC), *Laxmanappa* v. *Union of India.*

1951 SC 97 (100) [AIR V 38 C 11] : 1951 SCR 127 (SC), *Ramjilal* v. *Income-tax Officer, Mohinder Garh.*

[2] 1953 Raj 180 (181) (Pr 6) [AIR V 40 C 63] : ILR (1953) 3 Raj 52 (DB), *Bhanwarlal* v. *Rajasthan State.* (In a case where an illegal tax is being levied, mere delay in making an application against the illegal levy should not deter the High Court from passing an order under Art. 226, if it is proved that the tax is being levied illegally without any authority of law).

1953 Trav-Co 146 (155) (Pr 27) [AIR V 40 C 50] : ILR (1952) Trav-Co 960 (DB), *Joseph* v. *Asst. Excise Commissioners.* (Where a levy on collection of tax unauthorised by law under Art. 265 is made, relief may be given to the citizen in appropriate proceedings, not as a violation of a fundamental right to property under Art. 31 but as an *ultra vires* act of the State. Proceedings under Art. 226 of the Constitution are appropriate. AIR 1951 SC 97 (SC), Rel. on).

1951 Raj 139 (144) (Pr 12) [AIR V 38 C 63] (DB), *Manak Chand* v. *Municipal Council.* (Where a municipality imposes property tax on the petitioner without following the procedure prescribed by law, the right of the petitioner under Art. 265 of the Constitution not to be subject to any tax without the authority of law is infringed and he would be entitled to relief under Art. 226).

[3] 1954 SC 545 (554) (Pr 21) [AIR V 41 C 126] : 1955 SCR 448 (SC).

[4] 1955 SC 13 (17, 19) (Prs 13, 15) [(S) AIR V 42 C 5] : 1955 SCR 787 (SC).

the Constitution and as such void. In both the above cases the Supreme Court interfered under Art. 32 to prevent the continuation of the investigations under the impugned provisions. But in *Laxmanappa Hanumantappa* v. *Union of India*,[5] the Supreme Court declined to interfere under Art. 32 to restrain the collection of income-tax, on the ground that the investigation proceedings under the impugned Act had been completed long before the Supreme Court was moved and there was no question at that stage of enforcing any Fundamental Right under Art. 14. The attack on the assessment would be covered by Art. 265, the right under which was not a Fundamental Right.

Moreover, Art. 32 is not intended for relief against voluntary actions of a person. Thus, in *Gopaldas Mohta* v. *Union of India*,[6] a person was assessed to income-tax on the basis of a settlement in proceedings under Taxation on Income (Investigation Commission) Act, 1947. He subsequently applied for quashing of the whole proceedings on the ground that the Act was void as offending the provisions as to Fundamental Rights. It was held by the Supreme Court that the application to it under Art. 32 was misconceived and that the remedy, if any, of the applicant lay elsewhere.

See also Note 7. For further discussion of the question of relief against illegal taxation, see Arts. 226 and 32, Note 35, and Art. 286, Note 20.

11. "Levied or collected."—Under this article, not only the levy but also the collection of the tax must be sanctioned by law. Where the law provides that a certain tax may be collected in such manner as may be prescribed by rules made under the Act and no rules have been made under the Act for the collection of the tax in a certain class of cases, no tax under the Act can be collected in such cases.[1]

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[5] 1955 SC 3 (4) (Pr 5) [(S) AIR V 42 C 2] : 1955 SCR 769 (SC).

[6] 1955 SC 1 (3) [(S) AIR V 42 C 1] : 1955 SCR 773 (SC).

Article 265 — Note 11

[1] 1952 Nag 139 (144) (Prs 36, 38, 44) [AIR V 39] : ILR (1952) Nag 156 (DB), *Chhotabhai Jethabhai & Co.* v. *Union of India.* (Charging S. 3 (1) of the Central Excises and Salt Act, 1944 provides that "there shall be levied and collected in such manner as may be prescribed duties of excise ...." "Prescribed" means prescribed by rules under the Act. An examination of the rules under Central Excises Act, 1944 reveals that apart from Rule 10 or Rule 160 there is no power or authority to collect the duty in respect of excisable goods which have already been removed from the warehouse. Neither Rule 10 nor Rule 160 prescribes the mode of collecting duty in respect of such goods.

There is no rule at all to cover a case of the kind created by sub-section (2) of Section 7 under which the Union Government is empowered to collect duties which have not been collected but which would have been collected even after the goods have been cleared and

A provision whereby the *magistracy* is set up as the agency for the collection of taxes due to public authorities and the Government is valid.[2]

Consolidated Funds and Public Accounts of India and of the States.

266. (I) Subject to the provisions of Article 267 and to the provisions of this Chapter with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to States, all revenues received by the Government of India, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of India", and all revenues received by the Government of a State, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of the State".

(2) All other public moneys received by or on behalf of the Government of India or the Government of a State shall be credited to the public account of India or the public account of the State, as the case may be.

(3) No moneys out of the Consolidated Fund of India or the Consolidated Fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution.

GOVERNMENT OF INDIA ACT, 1935

For the text of S. 136 of the Government of India Act, 1935, which corresponded with ART. 266 of this Constitution, See NOTE 1.

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removed from the warehouse. The Collector or the Central Excise Officers are empowered to exercise powers conferred by the rules and if the rules have not provided, as to cover a case of this kind they cannot proceed to collect a tax, though it has been properly levied and is payable to the Government.)

[2] 1954 Mad 833 (835) [AIR V 41 C 281] : ILR (1955) Mad 184 : 1954 Cri L Jour 1267 (DB), *Guruviah Naidu In re.* (Section 15, Madras General Sales Tax Act, which vests the power to collect sales tax in a Presidency Magistrate or a Magistrate of the First Class is valid).

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in ART. 266 references to the State or States shall be construed as not including references to the State of Jammu and Kashmir—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Cl. (1)—Loan—Construction of, see Art. 366 (4).

Cl. (1)—Tax—Interpretation of, see Art. 366 (28).

Cl. (3)—"Shall be appropriated" — For provisions relating to appropriation out of the Consolidated Fund of India or of State, see Arts. 114 and 204.

Synopsis

1. Analogous law.
   (a) Government of India Act, 1935.
   (b) England.
   (c) Australia.
2. Scope of the article.
3. Appropriation Act.

1. Analogous law.

(a) Government of India Act, 1935.

(a) Government of India Act 1935.

Section 136 of the Government of India Act, 1935, runs a follows:

> "136. Subject to the following provisions of this chapter with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to Provinces and Federated States, and subject to the provisions of this Act with respect to the Federal Railway Authority, the expression 'revenues of the Federation' includes all revenues and public moneys raised or received by the Federation, and the expression 'revenues of the Province' includes all revenues and public moneys raised or received by a Province."

The following points of difference between the Government of India Act, 1935, and this Constitution may be noted in connection with this article:

(i) The Consolidated Fund of India and the Consolidated Fund of the State are creations and innovations introduced by the Constitution. The idea of a Consolidated Fund has been taken from the British system.

(ii) This article treats "revenues" as distinct from loans raised by the Government, moneys received in repayment of loans and other public moneys received by the Government. But by virtue of the definition in S. 136 of the Government of India Act, 1935, the expression "revenues of the Federation" includes all revenues and public moneys raised or received by the Federation. The expression "revenues of the Province" is similarly defined. This wide definition, therefore, includes within the word "revenues" the other items mentioned above, namely, loans raised, moneys received in payment of loans and other public moneys.

(iii) Under the Government of India Act, 1935, all revenues and public moneys raised or received by the Federation constituted revenues of the Federation. Thus, under the Government of India Act, 1935, even taxes and duties, of which the proceeds were assigned to the Provinces, were included in the expression "revenues of the Federation." But under this Constitution, taxes and duties, the proceeds of which are assigned to the State, will not form part of the Consolidated Fund of India, but will form part of the Consolidated Fund of the respective States. See ARTS. 268 (2), 269 (2) and 270 (2).

(iv) The Government of India Act, 1935, did not provide for a separate account corresponding to the Public Account of India or the Public Account of the State, as distinct from Revenues of the Federation or Revenues of the Province, in which public moneys other than revenues, loans and moneys received in repayment of loans were to be deposited.

(b) England.[1]

(b) England.

As already stated, the conception of a Consolidated Fund has been borrowed from the English system and is an innovation introduced by this Constitution. In fact, the idea of an Appropriation Act (as distinct from the Finance Act) for the purpose of appropriating the sums of money from the Consolidated Fund for the items granted by the Legislature is taken from the English system.

The provision for a Comptroller and Auditor-General of India (ARTS. 148 to 151) as an independent authority to control the accounts of the Union and the States has its counterpart under the English system, although there was also provision in the Government of India Act for the appointment of an Auditor-General. (See Government of India Act, 1935, S. 166.)

As seen in the commentary on ART. 265, under the English system as well as under this Constitution, no tax can be levied or collected except under the authority of a statute. There seems to be a difference between the English system and that under this Constitution as regards appropriations from the Consolidated Fund. Under this Constitution, appropriations from the Consolidated Fund can be made only by the annual Appropriation Act. But under the English system, such appropriations can be made only by permanent Acts and the Appropriation Act is necessary only in regard to items not covered by the permanent Acts.[2] But both under the English system and this Constitution, not a penny can be legally expended except under the authority of a statute.

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[1] *See* Introduction to the Study of the Law of the Constitution by A. V. Dicey, 9th (1952) Edition, pp. 312-319.

[2] Introduction to the Study of the Law of the Constitution by A. V. Dicey, 9th (1952) Edition, p. 317.

(c) Australia.

(c) Australia.

Section 81 of the Commonwealth of Australia Constitution Act, 1900, provides as follows:

> "81. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution."

2. Scope of the article. — Dicey in his LAW OF THE CONSTITUTION in the chapter dealing with "the Revenue"[1] mentions three questions in connection with the subject of public revenue :

(i) the *source* of the public revenue,
(ii) the authority for expending the public revenue, and
(iii) the securities provided by the law for the due appropriation of public revenue, that is, for its being expended in the exact manner which the law directs.

As regards the source of public revenue, Dicey points out that all taxes are imposed by statute and that no one can be forced to pay a single shilling by way of taxation which cannot be shown to the satisfaction of the Judges to be due from him under an Act of Parliament. The Indian Constitution embodies this principle in ART. 265.

The next question is as to the *expenditure* of public money and the authority therefor. In regard to this question, Dicey mentions two stages.

The first stage is : the payment of the whole of the public revenue of England into the Bank of England to the account of His Majesty's Exchequer. About His Majesty's Exchequer, Dicey says : "That office is a mere place for the receipt of taxes; it is a huge money box into which day by day moneys paid as taxes are drawn and whence such moneys are taken daily to the Bank."[2] This amount paid into the Bank of England to the account of His Majesty's Exchequer constitutes the revenue or the "Consolidated Fund" of the nation. The following passage from Halsbury's LAWS OF ENGLAND,[3] also shows what is meant by the Consolidated Fund in England :

> "At the present time practically the entire public revenue is paid into one general account called the Consolidated Fund or the Exchequer Account, out of which the whole of the public expenditure is paid. This account is kept at the Bank of England and is under the control of a permanent official known as the Comptroller and Auditor-General."

Article 263 — Note 2

[1] Introduction to the Study of the Law of the Constitution by A. V. Dicey, 9th (1952) Edition, Chap. X, Page 312.

[2] Introduction to the Study of the Law of the Constitution, 9th (1952) Edition, Page 316.

[3] Halsbury's Laws of England, 2nd (Hailsham) Edition, Vol. 24, P. 334.

The second stage in the expenditure of public revenue which Dicey mentions is its *appropriation* under an Act of Parliament. Dicey says:

> "Not a penny of revenue can be legally expended except under the authority of some Act of Parliament."[4] This authority may be given by a permanent Act or by the annual Appropriation Act which appropriates or fixes the sums payable to objects not provided for, by permanent Acts."

Thus, in England, first there is the creation of a Consolidated Fund and next, the appropriation of payments out of such Fund under the authority of Acts of Parliament.

The third question which Dicey mentions is, as already stated, the securities provided by law for the expenditure of public revenue in the manner which the law directs. This security is provided by an elaborate scheme of control and audit. The centre of this system of control is the Comptroller and Auditor-General.

It will be seen that, broadly speaking, the Indian Constitution has copied the British system in regard to all the three main aspects thereof mentioned above. Article 265 deals with the first aspect mentioned by Dicey, namely, the *source* of public revenue.

This article and ART. 267 are concerned with the second question mentioned above, namely, the *expenditure* of public revenue and public moneys. As under the British system, the Indian Constitution also contemplates two stages or aspects in regard to this question: *Firstly*, the creation of the Consolidated Fund, into which the public revenues and public moneys are collected, and *secondly*, the procedure of public expenditure by appropriation out of the Consolidated Fund under the authority of an Appropriation Act. Both these aspects are dealt with in this article.

Clause (1) of the article deals with the Consolidated Fund. The same machinery is provided both for the Centre and the States. Hence, there are to be a Consolidated Fund of India as well as a Consolidated Fund of the State for each of the States. Clause (3) provides that no moneys out of the Consolidated Fund shall be appropriated except in accordance with law.

It will be noted that both cls. (1) and (3) refer to the Consolidated Fund. Clause (2) refers to what is known as the Public Account of India or the Public Account of the State, as the case may be. This "Public Account" is different from the Consolidated Fund. The difference lies in the fact that it is only certain classes of public moneys that go into the Consolidated Fund. These classes are enumerated in cl. (1) of the article. They consist of the following:

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[4] Introduction to the Study of the Law of the Constitution, 9th (1952) Edition, Page 317.

(i) all revenues received by the Government;

(ii) all loans raised by the Government; and

(iii) all moneys received by the Government in repayment of loan.

"Loans" may be raised by the Government by the issue of Treasury Bills, loans or ways and means advances.

It is only the above items that will go into the Consolidated Fund, whether of India or of the State. All other public moneys received by or on behalf of the Central Government or the State Government, shall be credited to the Public Account of India or of the State, as the case may be. Among the prominent items which will fall in this class of public moneys may be mentioned receipts from commercial operations of the Government like Posts and Telegraphs, and from the exercise of sovereign rights of the State like escheat.

Appropriation by means of an Appropriation Act is only necessary in the case of the Consolidated Fund and not in that of the "Public Account" under cl. (2).

It may be noted that this article only deals with revenues and public moneys received by or on behalf of the *Government*, whether of the Centre or of the States. It does not deal with taxes and public moneys received by other authorities as, for instance, local authorities like municipalities, district boards, etc. Hence, these moneys need not be invested in the Consolidated Fund or the Public Account. Nor is an Appropriation Act necessary for spending moneys out of such funds.

Nor does the article apply to funds which are vested in and administered by statutory authorities, under special statutory provisions.[5]

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[5] *See* 1954 SC 388 (395) (Pr 22) [AIR V 41 C 93] : 1954 SCR 1055 (SC), *Ratilal* v. *State of Bombay*. (Contributions under S. 58, Bombay Public Trusts Act (29 of 1950) are to be credited to the Public Trusts Administration Fund as constituted under S. 57. It vests in the Charity Commissioner, and custody and investments of the money belonging to the fund and disbursement and payment therefrom are to be effected not in manner in which general revenues are disbursed but in the way prescribed by the rules made under the Act.)
1954 SC 400 (403) (Pr 9) [AIR V 41 C 96] : ILR (1954) Cut 334 : 1954 SCR 1046 (SC), *Sri Jagannath* v. *State of Orissa*. (Contribution that is levied under S. 49, Orissa Hindu Religious Endowments Act (4 of 1939) is demanded only for the purpose of meeting the expenses of the Commissioner and his office which is the machinery set up for the due administration of religious institutions. The collections made are not merged in the general public revenue and are not appropriated in the manner laid down for appropriation of expenses for other public purposes. They go to constitute a fund contemplated by S. 50

It has been seen in NOTE 4 on ART. 265 that there is a vital distinction between a tax and a fee and that a contribution levied for a specific benefit conferred or service rendered and earmarked for meeting the expenses in connection therewith, is a fee and not a tax. It is not intended that such earmarked contributions should be absorbed in the Consolidated Fund.[6]

Thus the revenues, which are intended to be placed in the Consolidated Fund, are only revenues that are raised for the general purposes of the State and not those which are earmarked for specific purposes.

This article must be read with ARTS. 112, 113 and 114. Article 112 refers to the annual financial statements. The estimates of expenditure embodied in the annual financial statement refer to the expenditure to be met from the Consolidated Fund of India. The voting of grants under ART. 113 relates to the estimate of expenditure in the annual financial statements and hence, only relates to expenses to be met from the Consolidated Fund. Article 114 provides for the passing of an Appropriation Act for the appropriation, out of the Consolidated Fund of India, of all moneys required to meet the grants made by the House of the People under ART. 113 and the expenditure charged on the Consolidated Fund of India. Clause (3) of ART. 114 provides that, except as provided for under ARTS. 115 and 116, no moneys shall be withdrawn from the Consolidated Fund of India except under appropriation made by the Appropriation Act. The corresponding provisions with regard to the States are contained in ARTS. 202, 203 and 204.

This article is subject to the provisions of ART. 267 and to the provisions of this chapter with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to States. Article 267 relates to the creation of a Contingency Fund for advances for meeting unforeseen expenditure. ARTICLES 268, 269 and 270 deal with the assignment of the proceeds of certain revenues to the States, and it is provided that such proceeds shall not form part of the Consolidated Fund of India.

Article 283 deals with the custody of the moneys in the three above-mentioned accounts, namely, the Consolidated Fund, the Contingency Fund, and the Public Account of India as well as of the

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of the Act and the fund is specifically set apart for the rendering of services involved in carrying out the provisions of the Act.)

[6] 1954 SC 282 (296) [AIR V 41 C 68] : 1954 SCR 1005 (SC), *The Commissioner, Hindu Religious Endowments* v. *Lakshmindra Thirtha Swamiar.*

1954 SC 400 (403) [AIR V 41 C 96] : ILR (1954) Cut 334 : 1954 SCR 1046 (SC), *Sri Jagannath* v. *State of Orissa.*

1954 SC 388 (395) (Pr 22) [AIR V 41 C 93] : 1954 SCR 1055 (SC), *Ratilal* v. *State of Bombay.*

States, the payment of moneys into such accounts and the withdrawal of moneys therefrom.

It will be noted that three Funds have been referred to above : (a) The Consolidated Fund, (b) The Public Account, and (c) The Contingency Fund.

The items that will go into the Public Account are mentioned in cl. (2) of this article. Clause (2) does not mention moneys received by Public Officers in their public capacity and by Courts. But these items also are to be placed in the Public Account of India or of the State, as the case may be. (See ART. 284.)

3. **Appropriation Act.**—Under cl. (3) of this article, no moneys out of the Consolidated Fund of India or the Consolidated Fund of a State shall be appropriated except in accordance with law and for the purpose and in the manner provided in the Constitution. The expression "law" in cl. (3) includes the Appropriation Acts.[1] Hence, as seen in NOTE 2, unless the requisite funds are appropriated from the Consolidated Fund by an Appropriation Act, the mere fact that the House of the People or the Legislative Assembly of a State has voted certain grants will not enable moneys to be withdrawn from the Consolidated Fund for public expenditure.

Suppose, a certain demand has been granted by the Legislature and an Appropriation Act has also been passed appropriating the sanctioned amount for the particular purpose. Is it necessary to have in addition to the Finance and Appropriation Acts, another separate Act to sanction the activity on which the money is proposed to be spent ? This question has arisen in connection with the constitutionality of Government engaging in trade or business without the sanction of a legislative enactment. Thus, suppose the Legislature has granted the demand for the funds for running a State transport service and the requisite Appropriation Act has also been passed, appropriating the funds necessary for the purpose. Is a separate Act authorising the State to run a public transport service necessary to enable the State to run the service? This question arose in *Motilal v. The Government of Uttar Pradesh*,[2] a Full Bench decision of the Allahabad High Court. In that case, there was a difference of opinion among the Judges. According to Malik C. J.,[3] such separate Act was not necessary. According to him the provision in cl. (3) of this article that no moneys can be appropriated except in accordance

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Article 266 — Note 3

[1] 1955 SC 549 (557) (Pr 16) [(S) AIR V 42 C 84] : (1955) 2 SCR 225 (SC), *Ram Jawaya Kapur v. State of Punjab.*

[2] 1951 All 257 [AIR V 38 C 51] : ILR (1951) 1 All 269 (FB).

[3] 1951 All 257 (266) (Pr 45) [AIR V 38 C 51] : ILR (1951) 1 All 269 (FB), *Motilal v. Govt. of Uttar Pradesh.*

with law only means that appropriation must be according to an Act of the Legislature and not that there must be a separate sanctioning of the activity for which the appropriation is made. Wanchoo and Mootham JJ.[4] also expressed the view that cl. (3) did not imply the necessity of a separate Act sanctioning the purpose for which moneys are appropriated by the Appropriation Act. Sapru J.[5] and Agarwala J.,[6] however, took the view that a mere Appropriation Act without specific legislation authorizing the State to engage in certain activity would not legalize the activity.

The majority view in the above Full Bench decision of the Allahabad High Court has been endorsed by the Supreme Court in *Ram Jawaya Kapur* v. *State of Punjab*.[7] In that case, the question was whether a State Government could engage in the business of printing and publishing text books for recognised schools in the State in the absence of a legislative enactment authorising it to do so. It was held by the Supreme Court that a legislative enactment was not necessary for the purpose of enabling the State Government to engage in the business, although the expenditure incurred by the Government in the matter must be sanctioned by the State Legislature and the required amount must be appropriated by the annual Appropriation Act. B. K. Mukherjea, J., in delivering the judgment of the Supreme Court, observed as follows :

> "Our Constitution, though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the

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[4] 1951 All 257 (281, 282) (Pr 112) [AIR V 38 C 51] : ILR (1951) 1 All 269 (FB), *Motilal* v. *Govt. of Uttar Pradesh.*

[5] 1951 All 257 (312) (Pr 281) [AIR V 38 C 51] : ILR (1951) 1 All 269 (FB), *Motilal* v. *Govt. of Uttar Pradesh.*

[6] 1951 All 257 (331) (Pr 446) [AIR V 38 C 51] : ILR (1951) 1 All 269 (FB), *Motilal* v. *Govt. of Uttar Pradesh.* (Passages from May's Parliamentary Practice, 14th Edn., pp. 712, 713, regarding authorisation of expenditure by an Appropriation Act without specific legal sanction quoted in para 445, at p 330.)

[7] 1955 SC 549 (553) [(S) AIR V 42 C 84] : (1955) 2 SCR 225 (SC). (*Commonwealth and the Central Wool Committee* v. *Colonial Combing, Spinning and Weaving Co. Ltd.*, 31 CLR 421 and *Attorney-General for Victoria* v. *The Commonwealth*, 52 CLR 533, Disting., AIR 1951 All 257 (FB), Approved. Agarwala J.'s view in it held to be too narrow and unsupportable.)

carrying on or supervision of the general administration of the State . . . . . .

"Suppose now that where the Ministry or the executive Government of a State formulates a particular policy in furtherance of which they want to start a trade or business. Is it necessary that there must be a specific legislation legalising such trade activities before they could be embarked upon? We cannot say that such legislation is always necessary. If the trade or business involves expenditure of funds, it is certainly required that Parliament should authorise such expenditure either directly or under the provisions of a statute. What is generally done in such cases is, that the sums required for carrying on the business are entered in the annual financial statement which the Ministry has to lay before the House or Houses of Legislature in respect of every financial year under ART. 202 of the Constitution. So much of the estimates as relate to expenditure other than those charged on the Consolidated Fund are submitted in the form of demands for grants to the Legislature and the Legislature has the power to assent or refuse to assent to any such demand or assent to a demand subject to reduction of the amount (ART. 203). After the grant is sanctioned, an Appropriation Bill is introduced to provide for the appropriation out of the Consolidated Fund of the State of all moneys required to meet the grants thus made by the Assembly (ART. 204). As soon as the Appropriation Act is passed, the expenditure made under the heads covered by it would be deemed to be properly authorised by law under ART. 266, cl. (3) of the Constitution . . . . . .

"It is true that the Appropriation Acts cannot be said to give a direct legislative sanction to the trade activities themselves. But so long as the trade activities are carried on in pursuance of the policy which the executive Government has formulated with the tacit support of the majority in the Legislature, no objection on the score of their not being sanctioned by specific legislative provision can possibly be raised."

The Pepsu High Court has also held that no special legislative enactment is necessary to enable a State Government to engage in trade or business.[8]

See also ART. 53, NOTE 6.

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[8] 1956 Pepsu 3 (5) (Prs 7, 8) [(S) AIR V 43 C 2] (DB), *People's Bus Service v. State.* (Motor Transport business.)

Contingency Fund.

267. (1) Parliament may by law establish a Contingency Fund in the nature of an imprest to be entitled "the Contingency Fund of India" into which shall be paid from time to time such sums as may be determined by such law, and the said Fund shall be placed at the disposal of the President to enable advances to be made by him out of such Fund for the purposes of meeting unforeseen expenditure pending authorisation of such expenditure by Parliament by law under Article 115 or Article 116.

(2) The Legislature of a State may by law establish a Contingency Fund in the nature of an imprest to be entitled "the Contingency Fund of the State" into which shall be paid from time to time such sums as may be determined by such law, and the said Fund shall be placed at the disposal of the Governor or Rajpramukh of the State to enable advances to be made by him out of such Fund for the purposes of meeting unforeseen expenditure pending authorisation of such expenditure by the Legislature of the State by law under Article 205 or Article 206.

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, clause (2) of Art. 267 shall be omitted. — The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Cl. (1)—ART. 115 deals with supplementary, additional or excess grants.
ART. 116 deals with votes on account, votes of credit and exceptional grants.
Cl. (2)—Art. 205 deals with supplementary, additional or excess grants.
ART. 206 deals with votes on account, votes of credit and exceptional grants.

1. Scope of the article. — It has been seen that ART. 266 provides for the creation of two separate accounts in respect of the public revenues and public moneys of India and the States. These two accounts are the Consolidated Fund and the Public Account. This article provides for a third account under the title the "Contingency Fund". The object of this Contingency Fund is to enable advances to be made for meeting unforeseen expenses pending authorization by the Legislature. (See ARTS. 115, 116, 205 and 206.)

The Contingency Fund under this article is to be established by Parliament by law. The Parliament shall also determine by law the sums to be paid into this fund. The Contingency Fund established by Parliament will be known as the Contingency Fund of India and it will be at the disposal of the President. Clause (2) of the article provides for the establishment of a Contingency Fund for each State by the Legislature of that State, to be placed at the disposal of the Governor or the Rajpramukh.

In pursuance of the powers conferred by this article, the Parliament has passed the Contigency Fund of India Act (49 of 1950). The Act provides for the establishment of a Contingency Fund of fifteen crores of rupees, out of the Consolidated Fund of India. This fund is to be held on behalf of the President by a Secretary to the Government of India in the Ministry of Finance.

The article provides that the Contingency Fund is to be in the nature of an "imprest". "Imprest" means, according to the dictionary, "money advanced to a person to be used in State business."

Distribution of Revenues between the Union and the States.

Duties levied by the Union but collected and appropriated by the States.

268. (1) Such stamp duties and such duties of excise on medicinal and toilet preparations as are mentioned in the Union List shall be levied by the Government of India but shall be collected—

(*a*) in the case where such duties are leviable within any State specified in Part C of the First Schedule, by the Government of India, and

(*b*) in other cases, by the States within which such duties are respectively leviable.

(2) The proceeds in any financial year of any such duty leviable within any State shall not form part of the Consolidated Fund of India, but shall be assigned to that State.

JAMMU AND KASHMIR

Article 268 applies to the State of Jammu and Kashmir—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Proclamation of Emergency—The provisions of this article shall have effect subject to such exceptions or modifications as the President thinks fit — See ART. 354.

Clause (1)—Union List—Meaning of, see ART. 246 (1).

"State specified in Part C of Sch. I" — Reference to, how to be interpreted, see ART. 264 (c).

States—Meaning of, see ART. 264 (b).

Clause (2)—Consolidated Fund of India—Formation of, see ART. 266.

1. **Scope of the article** — It has been seen that under ART. 265 taxes can be levied and collected only under statutory authority. The legislative lists in the Seventh Schedule enumerate the subjects as to which the Union Legislature and the State Legislatures can respectively make laws including those relating to taxes. But although a law imposing a certain tax can only be passed by the Union Legislature, this does not necessarily mean that the proceeds of the tax should go into the coffers of the Union. Nor does it mean that the tax must necessarily be *collected* by the Central Government. In all these cases, no doubt, the levy of the tax will be in virtue of a Central law. But the actual collection may be by the States. Similarly, the proceeds of the tax may be taken by the States or may be distributed between the Union and the States. This article is a first of a series dealing with the subject of distribution of revenues between the Union and the States.

The taxes mentioned in this article are, as already indicated, levied under Union laws. They are to be *levied* by the Government of India, but the actual *collection* of the taxes is to be made by the States in their respective areas and the amounts collected therein are to be appropriated by the respective States.

The taxes, covered by this article and dealt with as above, are such stamp duties (LIST 1, Entry 91) and such excise duties (LIST 1, Entry 84) on medicinal and toilet preparations as are mentioned in the Union List. The stamp duties above referred to are those on bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.

In the case of Part C States, the duties mentioned in this article shall be levied as well as collected by the Government of India, but the proceeds shall be assigned to the State in which the duties are collected.

As the proceeds of the duties mentioned in this article are assigned to the respective States in which they are levied, they do not form part of the Consolidated Fund of India, but they will form part of the Consolidated Fund of the particular State.

Taxes levied and collected by the Union but assigned to the States.

269. (1) The following duties and taxes shall be levied and collected by the Government of India but shall be assigned to the States in the manner provided in clause (2), namely :—

(*a*) duties in respect of succession to property other than agricultural land ;

(*b*) estate duty in respect of property other than agricultural land ;

(*c*) terminal taxes on goods or passengers carried by railway, sea or air ;

(*d*) taxes on railway fares and freights ;

(*e*) taxes other than stamp duties on transactions in stock-exchanges and futures markets ;

(*f*) taxes on the sale or purchase of newspapers and on advertisements published therein.

(2) The net proceeds in any financial year of any such duty or tax, except in so far as those proceeds represent proceeds attributable to States specified in Part C of the First Schedule, shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that duty or tax is leviable in that year, and shall be distributed among those States in accordance with such principles of distribution as may be formulated by Parliament by law.

GOVERNMENT OF INDIA ACT, 1935

For text of S. 137 of the Government of India Act, 1935, which corresponded with ART. 269 of this Constitution, see NOTE 1.

JAMMU AND KASHMIR

Article 269 applies to the State of Jammu and Kashmir—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

States—Meaning of, see ART. 264 (b).

Parliament—Power of, to levy surcharge on certain duties and taxes for purposes of the Union—See ART. 271.

Proclamation of Emergency—The provisions of this article shall have effect subject to such exceptions or modifications as the President thinks fit — See ART. 354.

Clause (1)—Tax—Interpretation of, see ART. 366 (28).
Clause (1) (b)—Estate duty—Interpretation of, see ART. 366 (9).
Clause (1) (c)—Goods—Interpretation of, see ART. 366 (12).
Clause (1) (c)—Railway—Interpretation of, see ART. 366 (20).
Clause (2)—"States specified in Part C of Sch. I"—Reference to, how to be construed—See ART. 64 (c).
Clause (2)—Consolidated Fund of India—Formation of, see ART. 266.
Clause (2)—Net proceeds—Meaning and calculation of, see ART. 279.

Synopsis

1. Analogous law.
    (a) Government of India Act, 1935.
2. Scope of the article.
3. "Net proceeds."
4. Part 'C' States.
5. Duties in respect of succession to properties other than agricultural land.

1. Analogous law.

(a) Government of India Act, 1935.

Section 137 of the Government of India Act, 1935, runs as follows:

> "137. Duties in respect of succession to property other than agricultural land, such stamp duties as are mentioned in the Federal Legislative List, terminal taxes on goods or passengers carried by railway, or air, and taxes on railway fares and freights, shall be levied and collected by the Federation, but the net proceeds in any financial year of any such duty or tax, except in so far as those proceeds represent proceeds attributable to Chief Commissioner's Provinces, shall not form part of the revenues of the Federation, but shall be assigned to the Provinces and to the Federated States, if any, within which that duty or tax is leviable in that year, and shall be distributed among the Provinces and those States in accordance with such principles of distribution as may be formulated by Act of the Federal Legislature :
>
> Provided that the Federal Legislature may at any time increase any of the said duties or taxes by a surcharge for Federal purposes and the whole proceeds of any such surcharge shall form part of the revenues of the Federation."

2. Scope of the article. — The taxes and duties mentioned in this article are to be both levied and collected by the Government of India. But their net proceeds are to be assigned to and distributed among the States in accordance with the principles that may be formulated by Parliament by law. It has been seen under ART. 268 that the duties mentioned therein are to be levied by the Government of India but actually collected and *directly* appropriated by the respective States. In regard to the taxes and duties mentioned in this article, the Central Government itself collects the taxes, but the net proceeds of the taxes are wholly assigned to the States and are to be distributed among them.

It will thus be seen that the taxes mentioned in ART. 268 and this article are really sources of State revenue and are intended to form part of the Consolidated Fund of the respective States and not of the Consolidated Fund of India. But as it was considered desirable to have uniformity of law as regards the levy, rates, incidence, and collection of these taxes, they were placed in the Union List.

Moreover, under ART. 271, the Parliament has the power by law to levy surcharge in respect of the taxes and duties referred to in ARTS. 269 and 270 for Union purposes and the amount of such surcharge will form the Consolidated Fund of India.

3. **"Net proceeds."** — For the mode of calculation of the net proceeds of any tax or duty, see ART. 279.

4. **Part 'C' States.** — The provision as to distribution of the net proceeds of taxes and duties among the States is not applicable to Part C States, and the taxes and duties, which are leviable within Part C States, will, therefore, form part of the Consolidated Fund of India.

5. **Duties in respect of succession to properties other than agricultural land.** — These duties are mentioned in cl. (1) (a) of this article and constitute one of the items covered by this article. The question arises whether court-fee levied under the Court-fees Act in respect of probate and letters of administration under SCH. I, ART. 11 of the Act is duty in respect of succession to property. It is submitted that it is not a duty on succession to property, inasmuch as it is payable not by all persons who succeed to property of a deceased, but by only such of them as take out probate and letters of administration.

Taxes levied and collected by the Union and distributed between the Union and the States.

270. (1) Taxes on income other than agricultural income shall be levied and collected by the Government of India and distributed between the Union and the States in the manner provided in clause (2).

(2) Such percentage, as may be prescribed, of the net proceeds in any financial year of any such tax, except in so far as those proceeds represent proceeds attributable to States specified in Part C of the First Schedule or to taxes payable in respect of Union

emoluments, shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that tax is leviable in that year, and shall be distributed among those States in such manner and from such time as may be prescribed.

(3) For the purposes of clause (2), in each financial year such percentage as may be prescribed of so much of the net proceeds of taxes on income as does not represent the net proceeds of taxes payable in respect of Union emoluments shall be deemed to represent proceeds attributable to States specified in Part C of the First Schedule.

(4) In this article—

(a) "taxes on income" does not include a corporation tax;

(b) "prescribed" means—

(i) until a Finance Commission has been constituted, prescribed by the President by order, and

(ii) after a Finance Commission has been constituted, prescribed by the President by order after considering the recommendations of the Finance Commission;

(c) "Union emoluments" includes all emoluments and pensions payable out of the Consolidated Fund of India in respect of which income-tax is chargeable.

GOVERNMENT OF INDIA ACT, 1935

For text of the corresponding S. 138 of the Government of India Act, 1935, see Note 1.

JAMMU AND KASHMIR

Article 270 applies to the State of Jammu and Kashmir — The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Parliament—Power of, to levy surcharge on certain duties and taxes for purposes of the Union—See ART. 271.

Proclamation of Emergency—The provisions of this article shall have effect subject to such exceptions or modifications as the President thinks fit — See ART. 354.

Clause (1)—States—Meaning of, see ART. 264 (b).

Clause (1)—Taxes on income — Interpretation of, see clause (4) (a) of this article and ART. 366 (29).

Clause (2)—Net proceeds—Meaning and calculation of, see ART. 279.

Clause (2)—"States specified in Part C of Sch. I"—Reference to, how to be construed, see ART. 264 (c).

Clause (2)—Consolidated Fund of India—Formation of, see ART. 266.

Clause (2)—Tax—Interpretation of, see ART. 366 (28).

Clause (2)—Distribution of taxes — See the Constitution (Distribution of Revenues) Order, 1953 — Gazette of India, dated 16-3-1953, Part II-Sec. 3, Extraordinary, page 803.

Clause (4) (a)—Corporation tax—Interpretation of, see ART. 366 (6).

Clause (4) (b)—Finance Commission—Meaning of, see ART. 264 (a).

Clause (4) (c)—Pension—Interpretation of, see ART. 366 (17).

Synopsis

1. Analogous law.
2. Scope of the article.

1. Analogous law. — Section 138 of the Government of India Act, 1935, as amended in 1947, runs as follows :

"138. (1) Taxes on income other than agricultural income shall be levied and collected by the Dominion, but a prescribed percentage of the net proceeds in any financial year of any such tax, except in so far as those proceeds represent proceeds attributable to Chief Commissioner's Provinces or to taxes payable in respect of Dominion emoluments, shall not form part of the revenues of the Dominion, but shall be assigned to the Provinces and to the Acceding States, if any, within which that tax is leviable in that year, and shall be distributed among the Provinces and those States in such manner as may be prescribed :

Provided that—

(a) the percentage originally prescribed under this sub-section shall not be increased by any Order of the Governor-General;

(b) the Dominion Legislature may at any time increase the said taxes by a surcharge for Dominion purposes and the whole proceeds of any such surcharge shall form part of the revenues of the Dominion.

For the purposes of this sub-section, in each financial year such percentage as may be prescribed, of so much of the net proceeds of taxes on income as does not represent the net proceeds of taxes payable in respect of Dominion emoluments shall be deemed to represent proceeds attributable to Chief Commissioners' Provinces.

(2) Notwithstanding anything in the preceding sub-section, the Dominion may retain out of the moneys assigned by that sub-section to Provinces and States—

(a) in each year of a prescribed period such sum as may be prescribed or, if it is so prescribed, the whole of those moneys; and

(b) in each year of a further prescribed period a sum less than that retained in the preceding year by an amount, being the same amount in each year, so calculated that the sum to be retained in the last year of the period will be equal to the amount of each such annual reduction :

Provided that—

(i) neither of the periods originally prescribed shall be reduced by any Order of the Governor-General ;

(ii) the Governor-General may in any year of the second prescribed period direct that the sum to be retained by the Dominion in that year shall be the sum retained in the preceding year, and that the second prescribed period shall be correspondingly extended, but he shall not give any such direction except after consultation with such representatives of Dominion, Provincial and State interests as he may think desirable, nor shall he give any such direction unless he is satisfied that the maintenance of the financial stability of the Dominion Government requires him to do so.

(3) Where an Act of the Dominion Legislature imposes a surcharge for Dominion purposes under this section, the Act shall provide for the payment by each Acceding State in which taxes on income are not leviable by the Dominion of a contribution to the revenues of the Dominion assessed on such basis as may be prescribed with a view to securing that the contribution shall be the equivalent, as near as may be, of the net proceeds which it is estimated would result from the surcharge if it were leviable in that State, and the State shall become liable to pay that contribution accordingly.

(4) In this section—

'Taxes on income' does not include a corporation tax ;

'Prescribed' means prescribed by Order of the Governor-General ; and

'Dominion emoluments' includes all emoluments and pensions payable out of the revenues of the Dominion in respect of which income-tax is chargeable."

2. Scope of the article.—Article 269 refers to taxes and duties which are to be levied and collected by the Government of India but are to be assigned wholly to the States. This article refers to a tax which is to be levied and collected by the Government of India, and distributed between the Union and the States. Article 272 is another article which also provides for the distribution between the Union and the States of certain taxes, levied and collected by the Union.

The taxes referred to in this article are those on income other than agricultural income. (LIST 1, ENTRY 82.)

The mode of distribution of the tax is laid down in cl. (2). The procedure under cl. (2) may be summarised as follows :

(i) First ascertain the net proceeds, in any financial year, of the tax in the manner laid down in ART. 279.

(ii) Deduct out of this sum the net proceeds of taxes payable in respect of Union emoluments as defined in cl. (4) (c).

(iii) Out of the balance, deduct a certain percentage as prescribed by the President's Order under cl. (4) (b) to represent net proceeds attributable to Part C States.

(iv) Out of the balance that remains, a certain percentage as prescribed by the President's Order under cl. (4) (b) is to be assigned to the States within which that tax is leviable in that year. This amount will not form part of the Consolidated Fund of India.

(v) The amount mentioned in (iv) is then distributed among those States in the manner and from such time as may be prescribed in the President's Order.

Surcharge on certain duties and taxes for purposes of the Union.

271. Notwithstanding anything in Articles 269 and 270, Parliament may at any time increase any of the duties or taxes referred to in those articles by a surcharge for purposes of the Union and the whole proceeds of any such surcharge shall form part of the Consolidated Fund of India.

GOVERNMENT OF INDIA ACT, 1935

NOTE. — See Proviso to S. 137 reproduced under Art. 269 and Proviso (b) to sub-section (1) of S. 138 reproduced under ART. 270.

JAMMU AND KASHMIR

Article 271 applies to the State of Jammu and Kashmir. — The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Proclamation of Emergency — The provisions of this article shall have effect subject to such exceptions or modifications as the President thinks fit— See Art. 354.

Tax—Interpretation of, see Art. 366 (28).

Consolidated Fund of India—Formation of, see Art. 266.

Synopsis

1. Analogous law.
   - (a) Government of India Act, 1935.
2. Scope of the article.

1. Analogous law.

(a) Government of India Act, 1935.

(a) Government of India Act, 1935.

See Proviso to S. 137 quoted under ART. 269 and Proviso (b) to sub-section (1) of S. 138 quoted under ART. 270.

2. Scope of the article.—The taxes and duties mentioned in ART. 269 are to be levied and collected by the Government of India but assigned wholly to the State. The taxes mentioned in ART. 270 are to be shared between the Union and the States. In regard to these two classes of taxes, this article provides that Parliament may, by law, provide for the levy of a surcharge exclusively for the benefit of the Union. It must be noted that although the duties mentioned in ART. 268 are to be collected and to be appropriated wholly by the States (though levied by the Union), this article does not provide for law being made by Parliament for the imposition of the surcharge in respect of such duties for the benefit of the Union.

Taxes which are levied and collected by the Union and may be distributed between the Union and the States.

272. Union duties of excise other than such duties of excise on medicinal and toilet preparations as are mentioned in the Union List shall be levied and collected by the Government of India, but, if Parliament by law so provides, there shall be paid out of the Consolidated Fund of India to the States to which the law imposing the duty extends sums equivalent to the whole or any part of the net proceeds of that duty, and those sums shall be distributed among those States in accordance with such principles of distribution as may be formulated by such law.

GOVERNMENT OF INDIA ACT, 1935

"140. (1) Duties on salt, Federal duties of excise and export duties shall be levied and collected by the Federation, but, if an Act of the Federal Legislature so provides, there shall be paid out of the revenues of the Federation to the Provinces and to the Federated States, if any, to which the Act imposing the duty extends, sums equivalent to the whole or any part of the net proceeds of that duty, and those sums shall be distributed among the Provinces and those States in accordance with such principles of distribution as may be formulated by the Act."

JAMMU AND KASHMIR

Article 272 applies to the State of Jammu and Kashmir — The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954)

COGNATE PROVISIONS

Proclamation of Emergency — The provisions of this article shall have effect subject to such exceptions or modifications as the President thinks fit— See Art. 354.

Union List—Meaning of, see Art. 246 (1).

States—Meaning of, see Art. 264 (b).

Consolidated Fund of India—Formation of, see Art. 266.

Net proceeds—Meaning and calculation of, see Art. 279.

1. Scope of the article. — Article 268 refers to (*inter alia*) certain excise duties, namely, such duties of excise on medicinal and toilet preparations as are mentioned in the Union List. With regard to these excise duties, ART. 268 provides that they are to be levied by the Union but collected and wholly appropriated by the States. The present article refers to duties of excise other than those covered by ART. 268. With regard to such duties, the article provides that they are to be levied and collected by the Union, but are to be shared between the Union and the States if Parliament by law so provides. The sharing under this article is thus made to depend upon Parliament making a law providing for the same. But under ART. 270, as has been seen, taxes on income other than agricultural income are required by the Constitution itself to be shared between the Union and the States. Another point of difference that may be mentioned between ART. 270 and this article is that under ART. 270, the proportion of the net proceeds of the taxes to be assigned to the States and the mode of distribution of such taxes among the States are to be fixed by the President's Order. But under this article it is the Parliament which has to determine by law whether the whole or any part of the net proceeds of the duty should be assigned to the States. Parliament has also to determine the mode of distribution of the net proceeds of the tax among the States.

Grants in lieu of export duty on jute and jute products.

273. (1) There shall be charged on the Consolidated Fund of India in each year as grants-in-aid of the revenues of the States of Assam, Bihar, Orissa and West Bengal, in lieu of assignment of any share of the net proceeds in each year of export duty on jute and jute products to those States, such sums as may be prescribed.

(2) The sums so prescribed shall continue to be charged on the Consolidated Fund of India so long as

any export duty on jute or jute products continues to be levied by the Government of India or until the expiration of ten years from the commencement of this Constitution, whichever is earlier.

(3) In this article, the expression "prescribed" has the same meaning as in Article 270.

GOVERNMENT OF INDIA ACT, 1935

"140. (2) Notwithstanding anything in the preceding sub-section, one-half, or such greater proportion as His Majesty in Council may determine, of the net proceeds in each year of any export duty on jute or jute products shall not form part of the revenues of the Federation, but shall be assigned to the Provinces or Federated States in which jute is grown in proportion to the respective amounts of jute grown therein.

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, ART. 273 shall be omitted — The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Proclamation of Emergency — The provisions of this article shall have effect subject to such exceptions or modifications as the President thinks fit—See Art. 354.

Consolidated Fund of India—Formation of, see Art. 266.

Clause (1)—Net proceeds—Meaning and calculation of, see Art. 279.

Clause (1)—"Such sums as may be prescribed"—See clause (4) of the Constitution (Distribution of Revenues) Order, 1950, made by the President under C. O. 12 (S. R. O. 7) dated 13-4-1950 published in the Gazette of India, 1950, Part II, Sec. 3, Extra., page 3.

Clause (2) — Commencement of this Constitution — Meaning of — This Constitution came into force on 26-1-1950—See Art. 394.

Synopsis

1. Analogous law.
    - (a) Government of India Act, 1935.
2. Scope of the article.

1. Analogous law.

(a) Government of India Act, 1935.

(a) Government of India Act, 1935.

See Section 140 (2) of the Government of India Act, 1935, quoted under the text of this article.

2. Scope of the article. — This article refers to another principle in the distribution of revenue between the Centre and the States. The principles hitherto noticed are (i) total assignment of the net proceeds of certain revenues to the States and the distribution of such proceeds among them, and (ii) the sharing of the net proceeds of certain taxes between the Union and the States. This article introduces another principle, namely, the principle of grants-in-aid by the Union. The article refers to export duties on jute and jute products.

With regard to these duties, the position under the Government of India Act, 1935, was that they were to be shared by the Centre and the Provinces in which the jute was grown. This article abolishes the principle of sharing and introduces the principle of grants-in-aid. Export duty is a source of Union revenue but the grants-in-aid provided for under the article are intended to help the States concerned in getting over budget difficulties caused by the deprivation of the share to which they were entitled under the Government of India Act. The provision is intended to be a temporary one, and the maximum period during which it is to be enforced is 10 years from the coming into force of the Constitution.

Prior recommendation of President required to Bills affecting taxation in which States are interested.

274. (1) No Bill or amendment which imposes or varies any tax or duty in which States are interested, or which varies the meaning of the expression "agricultural income" as defined for the purposes of the enactments relating to Indian income-tax, or which affects the principles on which under any of the foregoing provisions of this Chapter moneys are or may be distributable to States, or which imposes any such surcharge for the purposes of the Union as is mentioned in the foregoing provisions of this Chapter, shall be introduced or moved in either House of Parliament except on the recommendation of the President.

(2) In this article, the expression "tax or duty in which States are interested" means—

(a) a tax or duty the whole or part of the net proceeds whereof are assigned to any State; or

(b) a tax or duty by reference to the net proceeds whereof sums are for the time being payable out of the Consolidated Fund of India to any State.

GOVERNMENT OF INDIA ACT, 1935

For the text of corresponding S. 141 of the Government of India Act, 1935, see NOTE 1.

JAMMU AND KASHMIR.

Article 274 applies to the State of Jammu and Kashmir. — The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Proclamation of Emergency — The provisions of this article shall have effect subject to such exceptions or modifications as the President thinks fit—See Art. 354.

States—Meaning of, see Art. 264 (b).

Recommendation of the President—Bill or amendment passed or made without such recommendation—Effect of—See Art. 255.

Clause (1)—Tax—Interpretation of, see Art. 366 (2).

Clause (2) (a)—Net proceeds—Meaning and calculation of, see Art. 279.

Clause (2) (b)—Consolidated Fund of India—Formation of, see Art. 266.

Synopsis

1. Analogous law.
2. Object of the article.

1. Analogous law.—This article corresponds to S. 141 of the Government of India Act, 1935, which is reproduced below:

> "141. (1) No Bill or amendment which imposes or varies any tax or duty in which Provinces are interested, or which varies the meaning of the expression 'agricultural income' as defined for the purposes of the enactments relating to Indian income-tax, or which affects the principles on which under any of the foregoing provisions of this chapter moneys are or may be distributable to Provinces or States, or which imposes any such Federal surcharge as is mentioned in the foregoing provisions of this chapter, shall be introduced or moved in either Chamber of the Federal Legislature except with the previous sanction of the Governor-General.
>
> (2) The Governor-General shall not give his sanction to the introduction of any Bill or the moving of any amendment imposing in any year any such Federal surcharge as aforesaid unless he is satisfied that all practicable economies and all practicable measures for otherwise increasing the proceeds of Federal taxation or the portion thereof retainable by the Federation would not result in the balancing of Federal receipts and expenditure on revenue account in that year.
>
> (3) In this section the expression 'tax or duty in which Provinces are interested' means—
>
> (a) a tax or duty the whole or part of the net proceeds whereof are assigned to any Province; or
>
> (b) a tax or duty by reference to the net proceeds whereof sums are for the time being payable out of the revenues of the Federation to any Provinces."

It will be noted that sub-section (2) of the above section has been omitted in this article.

2. Object of the article. — The object of the article is to prevent disturbance of the financial scheme of the Government by the introduction of private legislation.

Grants from the Union to certain States.

275. (1) Such sums as Parliament may by law provide shall be charged on the Consolidated Fund of India in each year as grants-in-aid of the revenues of such States as Parliament may determine to be in need of assistance, and different sums may be fixed for different States:

Provided that there shall be paid out of the Consolidated Fund of India as grants-in-aid of the revenues of a State such capital and recurring sums as may be necessary to enable that State to meet the costs of such schemes of development as may be undertaken by the State with the approval of the Government of India for the purpose of promoting the welfare of the Scheduled Tribes in that State or raising the level of administration of the Scheduled Areas therein to that of the administration of the rest of the areas of that State:

Provided further that there shall be paid out of the Consolidated Fund of India as grants-in-aid of the revenues of the State of Assam sums, capital and recurring, equivalent to—

(*a*) the average excess of expenditure over the revenues during the two years immediately preceding the commencement of this Constitution in respect of the administration of the tribal areas specified in Part A of the table appended to Paragraph 20 of the Sixth Schedule; and

(*b*) the costs of such schemes of development as may be undertaken by that State with the approval of the Government of India for the purpose of raising the level of administration of the said areas to that of the administration of the rest of the areas of that State.

(2) Until provision is made by Parliament under clause (1), the powers conferred on Parliament under that clause shall be exercisable by the President by order and any order made by the President under this clause shall have effect subject to any provision so made by Parliament:

Provided that after a Finance Commission has been constituted no order shall be made under this clause by the President except after considering the recommendations of the Finance Commission.

GOVERNMENT OF INDIA ACT, 1935

For text of corresponding provision in S. 142 of the Government of India Act, 1935, see NOTE 1.

JAMMU AND KASHMIR

Article 275 applies to the State of Jammu and Kashmir — The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Proclamation of Emergency—The provisions of this article shall have effect subject to such exceptions or modifications as the President thinks fit—See Art. 354.

Clause (1)—Consolidated Fund of India—Formation of, see Art. 266.

Clause (1)—"Grants-in-aid of the revenues" —See clause (4) of the Constitution (Distribution of Revenues) Order, 1950, made by the President under C. O. 12 (S. R. O. 7) dated 13-4-1950 published in the Gazette of India, 1950, Part II-Sec. 3, Extra, page 3.

Clause (1), Proviso 1—Scheduled Tribes—Interpretation of, see Art. 366 (25).

Clause (1), Proviso (2) (a) — Commencement of this Constitution— This Constitution came into force on 26-1-1950—See Art. 394.

Clause (2), Proviso—Finance Commission—Meaning of, see Art. 264 (a).

Synopsis

1. Analogous law.
    - (a) Government of India Act, 1935.
    - (b) England.
    - (c) Australia.
2. Scope of the article.

1. Analogous law.

(a) Government of India Act, 1935.

(a) Government of India Act, 1935.

Section 142, Government of India Act, 1935, runs as follows:

"142. Such sums as may be prescribed by Order of the Governor-General shall be charged on the revenues of the Dominion in each year as grants-in-aid of the revenues of such Provinces as the Governor-General may determine to be in need of assistance, and different sums may be prescribed for different Provinces."

(b) England.

(b) England.

The following is taken from Halsbury's LAWS OF ENGLAND:[1]

"As from the passing of the Local Government Act, 1929, an annual General Exchequer Contribution became payable out of moneys provided by Parliament in each year towards local government expenses in counties and county boroughs, and provision is made for apportioning this contribution between counties, and county boroughs, and within counties between districts, or, in London, between the London County Council, the Common Council of the City of London, and the metropolitan boroughs."

(c) Australia.

(c) Australia.

Section 96 of the Commonwealth of Australia Constitution Act, 1900, runs as follows :

"During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."

2. Scope of the article. — The principle of grants-in-aid as a method of augmenting the revenues of the State has already been noticed under ART. 273 under which for a maximum period of ten years from the commencement of the Constitution, the grants-in-aid of the revenues of certain States have been enjoined to be given out of the Consolidated Fund of India in lieu of share in the export duty levied on jute and jute products produced in those States. The present article contains a general provision for grants-in-aid out of the Consolidated Fund of India, to be made under Parliamentary legislation for the benefit of States which may be in need of such assistance. This general provision is contained in paragraph 1 of cl. (1) of this article, and the grants-in-aid are to be made each year to such States as Parliament may determine. In addition to this general provision, the two Provisos to cl. (1) provide for grants-in-aid for meeting the cost of schemes of development undertaken by a State with the approval of the Union Government for promoting the welfare of Scheduled Tribes or for raising the level of administration of Scheduled Areas.

Taxes on professions, trades, callings and employments.

276. (1) Notwithstanding anything in Article 246, no law of the Legislature of a State relating to taxes for the benefit of the State or of a municipality,

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Article 275 — Note 1

[1] Halsbury's Laws of England, 2nd Edn., Vol. 28, p. 531, Para 1120.

district board, local board or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income.

(2) The total amount payable in respect of any one person to the State or to any one municipality, district board, local board or other local authority in the State by way of taxes on professions, trades, callings and employments shall not exceed two hundred and fifty rupees per annum:

Provided that if in the financial year immediately preceding the commencement of this Constitution there was in force in the case of any State or any such municipality, board or authority a tax on professions, trades, callings or employments the rate, or the maximum rate, of which exceeded two hundred and fifty rupees per annum, such tax may continue to be levied until provision to the contrary is made by Parliament by law, and any law so made by Parliament may be made either generally or in relation to any specified States, municipalities, boards or authorities.

(3) The power of the Legislature of a State to make laws as aforesaid with respect to taxes on professions, trades, callings and employments shall not be construed as limiting in any way the power of Parliament to make laws with respect to taxes on income accruing from or arising out of professions, trades, callings and employments.

GOVERNMENT OF INDIA ACT, 1935

For text of the corresponding provision in S. 142-A of the Government of India Act, 1935, see NOTE 1.

JAMMU AND KASHMIR

Article 276 applies to the State of Jammu and Kashmir—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Proclamation of Emergency—The provisions of this article shall have effect subject to such exceptions or modifications as the President thinks fit — See ART. 354.

State—Meaning of, see ART. 264 (b).

Clause (1)—ART. 246 deals with subject-matter of laws made by Parliament and by the Legislatures of States.

Clause (1)—Tax—Interpretation of, see ART. 366 (28).

Clauses (1), (3)—Tax on income—Interpretation of, see ART. 366 (29).

Clause (2), Proviso —Commencement of this Constitution — Meaning of—This Constitution came into force on 26-1-1950—See ART. 394.

Synopsis

1. Analogous law.
2. Object of the article.
3. Taxes in respect of professions, trades, callings or employments.
4. Maximum limit of profession-tax.
5. "Any one person."
6. Fundamental Rights.

1. Analogous law.—Government of India Act, 1935, S. 142-A runs as follows:

> "142-A. (1) Notwithstanding anything in section one hundred of this Act, no Provincial law relating to taxes for the benefit of a Province or of a municipality, district board, local board or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income.
>
> (2) The total amount payable in respect of any one person to the Province or to any one municipality, district board, local board, or other local authority in the Province by way of taxes on professions, trades, callings and employments shall not, after the thirty-first day of March nineteen hundred and thirty-nine, exceed fifty rupees per annum:
>
> Provided that, if in the financial year ending with that date there was in force in the case of any Province or any such municipality, board or authority a tax on professions, trades, callings or employments the rate, or the maximum rate, of which exceeded fifty rupees per annum, the preceding provisions of this sub-section shall, unless for the time being provision to the contrary is made by a law of the Federal Legislature, have effect in relation to that Province, municipality, board or authority as if for the reference to fifty rupees per annum there were substituted a reference to that rate or maximum rate, or such lower rate, if any (being a rate greater than fifty rupees per annum), as may for the time being be fixed by a law of the Federal Legislature; and any law of the Federal Legislature made for any of the purposes of this proviso may be made either generally or in relation to any specified provinces, municipalities, boards or authorities.
>
> (3) The fact that the Provincial Legislature has power to make laws as aforesaid with respect to taxes on professions, trades, callings and employments shall not be construed as limiting, in

relation to professions, trades, callings and employments, the generality of the entry in the Federal Legislative List relating to taxes on income."

2. Object of the article.—Under SCH. VII, LIST 1, Entry 82, taxes on income other than agricultural income constitute a Union subject of legislation. Under LIST 2, Entry 60, taxes on professions, trades, callings and employments are a State subject. There is a distinction between a tax on professions, trades, callings or employments and a tax on income accruing from or arising out of professions, trades, callings and employments.[1]

A tax on income is charged on a person simply in his capacity of having an income, and the question of the profession, trade or calling in which he is engaged is immaterial. But a profession tax is charged on a person in his capacity of practising a profession or carrying on a trade or calling. But the profession-tax may be a fixed amount or it may be a graduated amount, depending on the income derived from the profession. In the latter case it may often be a matter of difficulty to determine whether the tax is really an income-tax or a profession-tax. In *District Board, Farrukhabad* v. *Prag Dutt*,[2] Malik, C. J., observed as follows:

> "A tax on professions, trades, callings or employments may not be a graduated tax according to the income earned from the profession, trade, calling or employment. In that case it would be more in the nature of a licensing fee. It may again be a graduated tax and if it is on the basis of income derived from professions,

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Article 276 — Note 2

[1] 1953 Madh-B 20 (21, 24) [AIR V 40 C 12] (DB), *Ramprasad* v. *War Profits Tax Officer*.

[*See* (1924) 1924 App Cas 999 (1006) : 94 LJ PC 9, *Caron* v. *The King*. (Income-tax Acts are not discriminating statutes. They are statutes for imposing on all citizens contributions according to their annual means, regardless of, or it may be said not having regard to the source from which their annual means are derived.)]

[*See also* 1948 All 382 (Pr 15) [AIR V 35 C 50] : ILR (1949) All 26 (FB), *Dist. Board, Farrukhabad* v. *Prag Dutt*. (Per Malik C. J. : It is not the name which is given to the tax that matters but its pith and substance. The fundamental difference between a tax on income and a tax on circumstances and property is that income-tax can only be levied if there is income and if there is no income, no tax is payable; but in the case of circumstances and property tax, where a man's status has to be determined his total business turnover may be considered for purposes of taxation, though he may not have earned any taxable income. As pointed out in *In re a Reference under Govt. of Ireland Act* 1936 App Cas 352, the measure of the tax is not itself the test. In determining the nature of the tax consideration may be given to the standard on which the tax is levied but that is not the determining factor. See AIR 1940 Bom 65.)]

[2] 1948 All 382 (386) [AIR V 35 C 50] : ILR (1949) All 26 (FB).

trades, callings or employments and is payable only if there is income, a serious question for consideration may arise whether it is anything other than income-tax."

This article makes it clear that a tax on professions, trades, callings or employments imposed by a State cannot be called in question on the ground that it is a tax on income, which is within the exclusive jurisdiction of the Central Legislature to impose.[3]

3. Taxes in respect of professions, trades, callings or employments. — The undermentioned cases[1] are illustrative of what will constitute taxes on professions, trades, callings or employments.

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[3] *See* 1955 NUC (Punj) 4995 [AIR V 42], *District Board, Rohtak* v. *Master Jamna Das.* (Government of India Act (1935), S. 142A — Profession tax — The objection that profession tax imposed by East Punjab Govt. by Notification No. 458-LG-49/20921, D/- 9-4-1949 in pursuance of S. 31 (3), Punjab District Boards Act was tax on income, has no validity under S. 142A).

Article 276 — Note 3

[1] 1948 All 382 (386) [AIR V 35 C 50] : ILR (1949) All 26 (FB), *District Board, Farrukhabad* v. *Prag Dutt.* (Tax on circumstances graduated according to income from trade held to be tax on trade — Difference between income-tax and tax on circumstances pointed out.)

1949 Nag 190 (192) (Pr 17) [AIR V 36 C 79] : ILR (1949) Nag 87 (FB), *Dist. Council, Bhandara* v. *Kishorilal.* (The tax imposed by a District Council of Bhandara by a notification dated 15-7-1937 at the rate of one anna per *khandi* on persons carrying on the trade of husking, milling or grinding of grains is a tax on professions, trades, callings or employments within the meaning of S. 142A of the Government of India Act, 1935.)

1956 Bom 1 (13) (Prs 28, 40) [(S) AIR V 43 C 1] : ILR (1955) Bom 680 (DB), *State of Bombay* v. *Chamarbaugwalia.* (Bombay Lotteries and Prize Competition Control and Tax Act (54 of 1948) (as amended by Bombay Act 30 of 1952), S. 12A—Tax imposed under, is not a tax on betting or gambling falling under Entry 62 — It is a tax on the business of the persons who conduct the competitions falling within Entry 30, and as a tax on the business it is bad on the ground that it contravenes the provisions of Art. 273(2).)

1955 Sau 90 (91) (Prs 3, 4) [(S) AIR V 42 C 32] (DB), *Kantilal* v. *Patitana Municipality.* (The true test for determining whether a particular tax is a tax on "calling" referred to in Art. 276 or the tax on "entertainments" under item 62 of the State list is to ascertain the incidence of the tax. If the incidence falls on the person because he is engaged in the business of providing the entertainment for profit, it is a tax on his calling; but if the incidence of the tax falls on the particular entertainment irrespective of whether the person providing the entertainment follows that calling or not, then it is a tax on the entertainment and falls within item No. 62 of the State list and as such will not be hit by Art. 276. If for instance, the tax is to be paid on a cinema show irrespective of whether it is given by a professional exhibitor or by one following a different calling, e.g., by a charitable society to raise funds for a charity, it is obvious that the tax can only

4. Maximum limit of profession-tax. — Clause (2) of the article prescribes a maximum limit for a tax, under a State law, on professions, trades, callings or employments. This limit is Rs. 250 for any one person. But the limit is with reference to the tax payable to the State or to any one municipality, district board, local board or other local authority. Hence, if profession taxes are levied separately *both* by the State Government and a municipality or district board, the maximum limit will apply to each of the taxes separately and not together, so that the fact that the *total* amount of the two taxes exceed Rs. 250 per annum will not invalidate them, provided that the limit of Rs. 250 is not exceeded if the taxes are taken individually.

The Proviso to cl. (2) saves the validity of pre-Constitution laws levying or permitting the levy of taxes on professions, trades, callings or employments, beyond Rs. 250. In this connection it should be noticed that under S. 142-A of the Government of India Act, 1935 (corresponding to this article), and the Profession Tax Limitation Act, (20 of 1941), the maximum limit for profession tax in British India was Rs. 50. Hence the Proviso to cl. (2) obviously refers to laws that may have been in force immediately before the Constitution in areas which came under the category of "Native States."

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be regarded as a tax on entertainment and not a tax on calling, for what is taxed is not the calling of the person providing the entertainment but the entertainment itself.

Hence a notification by a Municipality imposing theatre tax on cinema shows at certain rate per show is not hit by Art. 276(2) as the tax is on entertainment and not a tax on calling. AIR 1953 Madh-B 145, Dissented from. AIR 1954 Bom 261, Approved.)

1955 NUC (All) 1694 [AIR V 42] (DB), *District Board, Banaras* v. *G. F. Kellner & Co. Ltd.* (Tax at so many pies per rupee on a person's income from trade held to be tax on trade.)

1955 NUC (Orissa) 1126 [AIR V 42], *Special Officer, District Board, Cuttack* v. *Paramananda Rath.* (Licence fee of 0-1-0 per maund of jute per annum is tax on profession.)

1953 Madh-B 145 (146) [AIR V 40 C 50] : ILR (1952) Madh-B 301 (DB), *Shrikrishna Shaligram* v. *Municipal Committee, Ujjain.* (Performance tax of Rs. 5 per show at cinema is a tax on calling or trade — Dissented from in AIR 1955 Sau 90.)

1953 Madh-B 20 (21, 24, 25) (Prs 2, 17) [AIR V 40 C 12] (DB), *Ramprasad* v. *War Profits Tax Officer.* (Article 276 which refers to tax on professions, trades, callings and employments, is not applicable to the War Profits Tax under the Gwalior War Profits Tax Ordinance as it is purely a tax on income.)

1949 Mad 500 (501) (Prs 2, 3, 4) [AIR V 36 C 228], *Indo Commercial Bank* v. *Madras Corporation.* (Company Tax under S. 110 of Madras City Municipal Act 4 of 1919 is not profession tax.)

1949 Nag 215 (216) (Prs 5, 6) [AIR V 36 C 87] : ILR (1948) Nag 971 (DB), *Karanja Municipality* v. *New East India Press Co.* (A Municipal tax of 10 pies per *boja* of ginned cotton is such tax.)

The Proviso contains a clause that the above-mentioned taxes beyond the limit of Rs. 250 per annum may continue to be levied till Parliament by law provides to the contrary.

Section 142-A of the Government of India Act, 1935, was inserted in the Act in 1940. Sub-section (2) of the section contained a provision similar to cl. (2) of this article, fixing a maximum limit to the profession-tax (the limit fixed was Rs. 50 per annum). But the provision was to the effect that the profession-tax payable *after 31st March 1939* should not exceed the above limit. There was also a Proviso to sub-s. (2) corresponding to the Proviso to cl. (2) of this article which saved the validity of laws, which were in force prior to 31st March 1939, and under which profession-tax could be levied beyond the limit of Rs. 50. This Proviso also contained a clause to the effect that the profession-tax beyond the limit of Rs. 50 might continue to be levied under the above laws, till provision to the contrary was made by the Central Legislature. In virtue of this clause, the Profession Tax Limitation Act, 1941, was passed, fixing the maximum limit of profession tax as Rs. 50 per annum, so that, after the coming into force of the above Act in 1942 the maximum limit of profession-tax in *British India* was Rs. 50 per annum. There was no such limit as regards Native States. Hence, as already stated, the saving provisions in Proviso to cl. (2) seem to refer to the profession-tax leviable in what were "Native States" immediately before the coming into force of the Constitution.

The Proviso refers to a tax which was in force in the financial year immediately before the commencement of the Constitution. It has been held that where though the *law* imposing a tax was in force, the *tax* under it had not been levied by the particular State for some years before the Constitution, the tax could not be said to have been "in force" in the financial year immediately before the Constitution.[1]

5. "Any one person." — This expression includes a juristic person like a company and therefore, a trade-tax levied on a com-

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Article 276 — Note 4

[1] 1953 Madh-B 20 (21) [AIR V 40 C 12] (DB), *Ramprasad* v. *War Profits Tax Officer.* (Per Shinde C. J. : Gwalior War Profits Tax Ordinance of Samwat 2001 — Tax under Ordinance levied for last time for the year 1945-46 and not afterwards — Tax "not in force" in financial year immediately before Constitution and Art. 276(2) Proviso not applicable and the tax assessed for 1945-46 could not be recovered after the Constitution under Art. 276(2). (It could not be recovered under Art. 277 but could be recovered under Art. 278. Per Dixit J.: It could be recovered under Art. 277).)

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pany is also subject to the limit of Rs. 250 imposed by cl. (2) of the article.[1]

6. Fundamental Rights. — The right to practise any profession or to carry on any occupation, trade or business is a Fundamental Right guaranteed to every citizen under Art. 19 (1) (g). Hence, a tax on professions, trades, callings or employments cannot be levied in such a manner as to destroy the Fundamental Right.[1]

It is important to stress this point because, the maximum limit of Rs. 250 per annum applies to the tax payable to the State Government or to any one municipality, district board, local board or other local authority, and it is conceivable that the aggregate amount payable as profession-tax or trade-tax to different authorities reaches an amount which makes the practice of the profession or carrying on of the trade *prohibitive.* In such a case the law authorising the tax would be open to challenge as violating a citizen's Fundamental Right. For a discussion of the underlying principles, see Art. 265, Note 6.

Savings.

277. Any taxes, duties, cesses or fees which, immediately before the commencement of this Constitution, were being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of the State, municipality, district or other local area may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Union List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by Parliament by law.

Government of India Act, 1935

For text of corresponding provision in sub-section (2) of S. 143 of the Government of India Act, 1935, see Note 1.

Article 276 — Note 5

[1] 1955 NUC (All) 1694 [AIR V 42] (DB), *District Board, Banaras* v. *M/s G. F. Kelliner & Co. Ltd.*

1949 Nag 215 (216) (Pr 8) [AIR V 36 C 87] : ILR (1948) Nag 971 (DB), *Karanja Municipality* v. *New East India Press Co.* (Case under Govt. of India Act (1935), S. 142A, AIR 1914 Nag 26, Rel. on.)

Article 276 — Note 6

[1] 1952 Mad 395 (408) [AIR V 39 C 105/35] : ILR (1952) Mad 933, *Ananthakrishnan* v. *State of Madras.* (Per Venkatarama Ayyar J. : It stands to reason that a tax on a right to carry on business should not be such as to destroy it, as for example, a profession tax equal or nearly equal to the income earned in the previous year.)

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in Art. 277, reference to the commencement of the Constitution shall be construed as reference to the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Proclamation of Emergency — The provisions of this article shall have effect subject to such exceptions or modifications as the President thinks fit — See Art. 354.

Union List —Meaning of, see Art. 246 (1).

State—Meaning of, see Art. 264 (b).

Tax—Interpretation of, see Art. 366 (28).

Commencement of this Constitution — Meaning of — This Constitution came into force on 26-1-1950—See Art. 394.

Synopsis

1. Analogous law.
2. Scope and object of the article.
3. "Immediately before the commencement of this Constitution."
4. "The Government of any State."
5. "Continue to be levied."
6. "Applied to the same purpose."
7. "Until provision to the contrary is made by Parliament by law."

1. Analogous law. — This article corresponds to S. 143 (2) of the Government of India Act, 1935, which runs as follows :

> "Any taxes, duties, cesses or fees which, immediately before the commencement of Part III of this Act, were being lawfully levied by any Provincial Government, municipality or other local authority or body for the purposes of the Province, municipality, district or other local area under a law in force on the first day of January, nineteen hundred and thirty-five, may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Federal Legislative List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by the Federal Legislature."

2. Scope and object of the article.—This is one of the provisions in the Constitution intended to avoid any serious dislocation of Provincial finances as a result of constitutional changes. It has been seen under ART. 276 that express provision has been made therein by cl. (2) for the purpose of ensuring that the fixing of a maximum limit to the profession tax (a State subject) of Rs. 250 per annum does not cause a sudden disequilibrium in the finances of those States in which the profession-tax could have been levied beyond the limit of Rs. 250 per annum before the Constitution. This article is also aimed at achieving a similar result.

It refers to taxes which, before the commencement of the Constitution, were levied by Provincial authorities under Provincial laws, but which under the new Constitution have been made exclusive Union subjects. (The word "Provincial" has been used here in a broad non-technical sense as contrasted with the Central or Federal authority and is not limited to what were technically "Provinces" under the Government of India Act, 1935.) With regard to these taxes the article provides that notwithstanding their being placed in the Union List, they can be continued to be levied by the same authorities as before. But such an arrangement is only intended to be a temporary and a transitional one. The Parliament has been given authority by law to make "provision to the contrary" and upon such provision being made the Provincial or local authority will cease to have the power to levy the tax.

This article refers to taxes which are placed in the Union List. The corresponding provision, S. 143 (2) of the Government of India Act, 1935, also referred to taxes in the Federal List. Taxes in the Provincial List were not covered by the section. In regard to such taxes, therefore, any law of the period prior to the coming into force of the Government of India Act, 1935, under which the taxes were levied by Provincial authorities would not be affected by S. 143 (2), but continue in force by virtue of S. 292 of the Act, corresponding to ART. 372 of the new Constitution.[1] Similarly, under ART. 372 of the present Constitution also, pre-Constitution laws, under which any taxes could be levied by Provincial authorities, would continue in force and where such taxes are in the Provincial List, this article will not come into play at all.

Even in regard to taxes, which are placed in the Union List, it is not clear what specific purpose is served by this article (or S. 143 (2) of the Government of India Act, 1935), inasmuch as under ART. 372 pre-Constitution laws will continue in force. The fact that a certain subject is placed in the Union List under this Constitution

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Article 277 — Note 2

[1] 1950 SC 11 (13) (Pr 8) [AIR V 37 C 4] : 1950 SCR 15 (SC), *Ramkrishna Ramnath* v. *Kamptee Municipal Committee.* (An octroi duty levied under S. 66 (1) (e), C. P. and Berar Municipalities Act, 1922 comes within the exact wording of Entry 49 of List II of the Seventh Schedule to the Government of India Act, 1935 — Prima facie, therefore, there is no reason to consider the levy of the duty under the Provincial Legislation invalid, such levy being unaffected by reason of S. 143, Govt. of India Act and the same continued to be valid under S. 292 of the Act of 1935.

There is nothing in the Excise Act 1944 to make its provisions contrary to the provisions of S. 66 (1) (e), Central Provinces Municipalities Act or to the levy of octroi duty under the same. (Confirming on appeal ILR 1949 Nag 544.)

cannot affect the validity of laws which are thus continued in force and which were not *ultra vires* according to the Constitution under which they were passed. As to the authority of Parliament to make provision to the contrary, which is expressly reserved in this article, there could be no doubt about such authority even in the absence of such article, inasmuch as the taxes are, *ex hypothesi*, Union subjects. With effect from the 1st of April 1950, under S. 13 of the Finance Act, 1950, the old laws as to income-tax, super-tax or tax on profits of business in any Part B State, other than Jammu and Kashmir, or in Manipur, Tripura or Vindhya Pradesh or in the merged territory of Cooch-Behar, have been repealed. (See also NOTE 7.) This provision is a "provision to the contrary" made by Parliament within the meaning of this article.

One prominent instance, which will bring this article into play, is with reference to income-tax. Income-tax is a Union subject under this Constitution (LIST 1, Entry 82). Under the Government of India Act also, income-tax was a Federal subject. Hence, so far as British India was concerned, income-tax was a Central tax and not a Provincial tax. But income-tax was also being levied in several of the Native States which have now been incorporated under the same Constitution.

This article legalises the levy of income-tax in these areas under the old laws even after the commencement of the Constitution until Parliament makes provision to the contrary.[2]

3. **"Immediately before the commencement of this Constitution."** — This article only authorises the levy of the taxes which were levied *before* the coming into force of the Constitution. It does not authorise the levy of any new tax which is different from the tax which was previously levied.[1]

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[2] *See* 1954 Trav-Co 137 (138) (Pr 9) [AIR V 41 C 47] : ILR (1953) Trav-Co 1232 (FB), *Lekshman Shenoy* v. *Income-Tax Officer.* (The combined effect of Art. 277 of the Constitution and *S.* 13 *of the Finance Act,* 1950, is to effect a valid continuance of the operation of the Cochin Income-tax Act, 1117 and the Travancore Income-tax Act, 1121 for the purposes of the levy, assessment and collection of income-tax and super-tax in respect of the period indicated in S. 13.)

Article 277 — Note 3

[1] 1954 Mad 643 (649) (Pr 24) [AIR V 41 C 225] (DB), *Nageswara Rao* v. *State of Madras.* (The Madras Government Notification No. 941 D/- 16-11-1952 is ultra vires and unenforceable to the extent that it imposes new duty on medicinal preparations. The duty payable under Notification No. 473 of 7-3-1949 was in respect of the spirit contents of medicinal preparations at Rs. 35 per gallon; whereas the duty payable under Notification No. 941 is in respect of potable medicinal preparations at Rs. 3 per bulk gallon. The two duties are so dissimilar that it is not possible to treat the one as substantially identical with the

The question has been raised whether, in order to attract the applicability of this article, it is necessary that the chargeable period for which the tax was levied, that is, assessed before the Constitution, must be the one immediately before the Constitution or it might be one anterior to such period. Thus, in *Ram Prasad* v. *War Profits Tax Officer*,[2] the question was with regard to the levy of war profits tax under the Gwalior War Profits Tax Ordinance of Samwat 2001. The assessment in question was for the year 1945-1946. The Ordinance had not been repealed but was in force at the time of the commencement of the Constitution. But no tax had been levied under the Ordinance after 1946. The question arose whether the tax for 1945-1946 could be recovered after the coming into force of the Constitution by availing of this article. There was a difference of opinion between Shinde C. J. and Dixit J., on this question. According to Shinde C. J., this article had no application to the case, inasmuch as no tax had been levied under the Ordinance in question after 1946, that is, immediately before the commencement of the Constitution. But he held that by reason of the agreement between the Rajpramukh and the President, ART. 278, cl. (1) would cover the case and the tax for 1945-1946 could be recovered after the coming into force of the Constitution by virtue of ART. 278, cl. (1)(a). Dixit J., however, held that it was not necessary for the applicability of this article that the chargeable period for which the tax was levied must be one immediately before the coming into force of the Constitution, and therefore, this article applied to the case and the tax could be recovered. He also held that ART. 278, cl. (1)(a) had no application to the case inasmuch as the tax was not one "leviable by the Government of India" within ART. 278, cl. (1)(a).

4. "The Government of any State."—The article speaks of the taxes that were lawfully levied by "the Government of any State" before the commencement of the Constitution. Obviously the phrase "Government of any State" has been used in the sense of "State Government" as defined in the General Clauses Act, 1897, S. 3 (60),

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other. The tax on the spirit contents of medicinal preparations is in reality a tax on intoxicating liquors which has always been within the competence of the State legislatures (vide List II entry 31, Govt. of India Act, 1935 and List II entry 8 of the Constitution.) The duty imposed on bulk gallon by Notification No. 941 is clearly excise duty on medicinal preparations and that is under List I entry 84 of the Constitution within the exclusive competence of the Union. As neither the legislature nor the Govt. of Madras had on that date any competence to impose a duty on medicinal preparations the imposition under Notfn. No. 941 of 1952 is not within the saving of Art. 277 and must be held ultra vires.)

[2] **1953 Madh-B 20 (21, 25) (Prs 3, 19) [AIR V 40 C 12] (DB).**

cl. (a) of which provides as follows (cl. (b) is not material in this context):

> "(60) 'State Government',—
>
> (a) as respects anything done before the commencement of the Constitution, shall mean, in a Part A State, the Provincial Government of the corresponding Province, in a Part B State, the authority or person authorised at the relevant date to exercise executive government in the corresponding Acceding State, and in a Part C State, the Central Government."

5. **"Continue to be levied."**—The provision that the taxes may continue to be levied does not mean that they should continue to be levied, assessed or collected by the same State authorities as before the Constitution. Hence, there is nothing in the article to preclude the Parliament from making a law providing for the levy and collection of income-tax and super tax under a pre-Constitution Income-tax and Super Tax Act through authorities appointed under the Income-tax Act, 1922.[1]

The provisions of this article cannot be negatived by an agreement between the State Government and the Central Government. Till "provision to the contrary" is made by Parliament by law, the taxes mentioned in the article cannot be collected by the Central Government merely because under such an agreement the parties have accepted the recommendation of the Indian States Finance Enquiry Committee (1948-49) that all Federal sources of revenue with current outstandings should be taken over by the Union Government.[2]

6. **"Applied to the same purpose."**—Under this article, the tax, which is continued to be levied after the Constitution, is to be

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Article 277 — Note 5

[1] 1954 SC 163 (164) (Pr 5) [AIR V 41 C 32] : 1954 SCR 537 (SC), *Madhava Krishnaiah* v. *Income-tax Officer, Bangalore.* (There is nothing in Art. 277 to preclude Parliament making any law providing for the levy and collection of income-tax and super tax under the Mysore Income Tax Act through authorities appointed under the Indian Income Tax Act 1922. The Proviso to S. 13 of the Indian Finance Act is therefore not *ultra vires.*

It was contended in this case that the Union Parliament had no authority to legislate under Art. 245 read with Art. 277 grafting officers and authorities appointed under the Indian I. T. Act on the Mysore State for levy, assessment and collection of tax under the *State law.* — Contention was overruled.)

[2] 1953 Raj 145 (147) [AIR V 40 C 51] : ILR (1953) 3 Raj 128 (FB), *Maharaja Kishangarh Mills Ltd.* v. *Union of India.* (The *excise duties* which were being levied in Rajasthan before the Constitution could not be automatically levied and collected by the Union till the Parliament made provision to the contrary.)

applied to the same purposes as before, and so if previous to the Constitution the tax was applied to the purposes of the particular State, it would continue to be so applied and not to the purposes of the Union, even after the coming into force of the Constitution. Hence, the proceeds of the tax, levied after the coming into force of the Constitution under this article, will not be covered by the provisions of ART. 295, cl. (1) (a), and would not become the assets of the Union by virtue of that provision.[1]

7. "Until provision to the contrary is made by Parliament by law."—Under this article Parliament can provide by law that any of the taxes mentioned in the article should cease to be levied and collected by the State authorities from a certain date and that from such date the taxes should be levied and collected by the Union. Parliament has made such a provision in regard to income-tax and certain other taxes, by the Finance Act, 1950.

By this Act, the Indian Income-tax Act, and some other Indian fiscal laws are extended to the whole of India (with exceptions) including what were previously 'Native States'. At the same time, the corresponding laws which were previously in force in such States were repealed. The material provisions of the Act are given below :

> "3. With effect from the 1st day of April 1950, the following amendments shall be made in the Income-tax Act, namely —
>
> (a) for sub-section (2) of S. 1, the following sub-section shall be substituted, namely —
>
> '(2) It extends to the whole of India, except the State of Jammu and Kashmir, and applies also within that State to all persons in the service of the Government of India or the Government of any State other than the State of Jammu and Kashmir'.
>
> * * * *
>
> "11. With effect from the 1st day of April 1950, the following Acts, namely :
>
> (i) the Sea Customs Act, 1878 (VIII of 1878),
> (ii) the Land Customs Act, 1924 (XIX of 1924),
> (iii) the Indian Tariff Act, 1934 (XXXII of 1934), and
> (iv) the Central Excises and Salt Act, 1944 (I of 1944),
>
> and all rules and orders made thereunder which are in force immediately before the commencement of this Act, are hereby extended to, and shall be in force in, the whole of India except the State of Jammu and Kashmir.

Article 277 — Note 6

[1] 1953 Raj 145 (147) (Prs 8, 9) [AIR V 40 C 51] : ILR (1953) 3 Raj 128 (FB), *Maharaja Kishangarh Mills, Ltd.* v. *Union of India.*

(2) With effect from the 1st day of April 1950, the Indian Post Office Act, 1898, and all rules and orders made thereunder which are in force immediately before the commencement of this Act are hereby extended to, and shall be in force in, the whole of India.

(3) With effect from the 1st day of April 1950, the amendments specified in the Fourth Schedule shall be made in the Acts specified therein.

* * * *

"13. (1) If immediately before the 1st day of April 1950, there is in force in any Part B State other than Jammu and Kashmir or in Manipur, Tripura or Vindhya Pradesh or in the merged territory of Cooch-Behar any law relating to income-tax or super-tax or tax on profits of business, that law shall cease to have effect except for the purposes of the levy, assessment and collection of income-tax and super-tax in respect of any period not included in the previous year for the purposes of assessment under the Indian Income-tax Act, 1922 (XI of 1922), for the year ending on the 31st day of March 1951, or for any subsequent year, or, as the case may be, the levy, assessment and collection of the tax on profits of business for any chargeable accounting period ending on or before the 31st day of March 1949 :

Provided that any reference in any such law to an officer, authority, tribunal or Court shall be construed as a reference to the corresponding officer, authority, tribunal or Court appointed or constituted under the said Act. and if any question arises as to who such corresponding officer, authority, tribunal or Court is, the decision of the Central Government thereon shall be final :

Provided further that where under any such law, tax is chargeable on the total income including agricultural income, the assessment shall be made by the corresponding officer or authority referred to in the preceding proviso only in respect of income other than agricultural income, and the tax payable on such income shall be an amount bearing to the total amount of tax which would have been payable under the State law if a combined assessment had been made, the same proportion as such income bears to the total income including the agricultural income, so however that for this purpose any reduction of tax allowed on the agricultural income by the State law shall not be taken into account.

(2) If immediately before the 1st day of April 1950, there is in force in any State other than Jammu and Kashmir a law corresponding to, but other than, an Act referred to in sub-section (1) or (2) of S. 11, such law is hereby repealed with effect from the said date ; and if immediately before the said date there is in force

in the State of Jammu and Kashmir a law corresponding to the Indian Post Office Act, 1898 (VI of 1898), such law is hereby repealed with effect from the said date :

Provided that such repeal shall not affect (a) the previous operation of the corresponding law, or (b) any penalty, forfeiture or punishment ordered in respect of an offence committed against any such law, or (c) any investigation, legal proceeding or remedy in respect of such penalty, forfeiture or punishment, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment, may be imposed, as if this Act had not been passed."

Agreement with States in Part B of the First Schedule with regard to certain financial matters.

278. (1) Notwithstanding anything in this Constitution, the Government of India may, subject to the provisions of clause (2), enter into an agreement with the Government of a State specified in Part P of the First Schedule with respect to—

(a) the levy and collection of any tax or duty leviable by the Government of India in such State and for the distribution of the proceeds thereof otherwise than in accordance with the provisions of this Chapter;

(b) the grant of any financial assistance by the Government of India to such State in consequence of the loss of any revenue which that State used to derive from any tax or duty leviable under this Constitution by the Government of India or from any other sources;

(c) the contribution by such State in respect of any payment made by the Government of India under clause (1) of Article 291,

and, when an agreement is so entered into, the provisions of this Chapter shall in relation to such State have effect subject to the terms of such agreement.

(2) An agreement entered into under clause (1) shall continue in force for a period not exceeding

ten years from the commencement of this Constitution:

Provided that the President may at any time after the expiration of five years from such commencement terminate or modify any such agreement if after consideration of the report of the Finance Commission he thinks it necessary to do so.

JAMMU AND KASHMIR

Article 278 applies to the State of Jammu and Kashmir.—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Proclamation of Emergency—The provisions of this article shall have effect subject to such exceptions or modifications as the President thinks fit—See Art. 354.

Clause (1)—Recommendations to be made by the Finance Commission as to the continuance or modification of the terms of the agreement entered into under this article—See Art. 280 (3) (c).

Clause (1)—"State specified in Part B of Sch. I" — The States so specified are Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Patiala and East Punjab States Union, 'Rajasthan, Saurashtra and Travancore-Cochin.

Clause (1) (a)—Tax—Interpretation of, see Art. 366 (28).

Clause (1) (c)—Art. 291 deals with the privy purse sums of the Ruler of an Indian State.

Clause (2) — Commencement of this Constitution — Meaning of — This Constitution came into force on 26-1-1950—See Art. 394.

Clause (2), Proviso—Finance Commission—Meaning of, see Art. 264 (a).

Synopsis

1. Scope of the article.
2. "Levy and collection of any tax or duty leviable by the Government of India."—(Cl. (a).)

1. Scope of the article.—This article is one of the provisions of the Constitution designed to enable States which, previous to the Constitution, were Native States enjoying independent sources of revenue, to get over the financial difficulties that might be otherwise felt by them on account of the transference of some of their sources of revenue to the Centre under the new Constitution. Some of the other provisions of the Constitution, which may be referred to as having a similar object, are ART. 275 (Grants-in-aid of the revenues of States which may be in need of assistance), ART. 276 (States being allowed to continue to collect profession and trade taxes beyond the limit of Rs. 250 per annum fixed by that article) and ART. 277 (States being allowed to continue to levy the taxes which were being levied by them immediately before the Constitution till Parliament made provision to the contrary by law). Under this article it is provided that an agreement may be made between the Central Government and the State Government, which may provide for the three matters mentioned in sub-cls. (a), (b) and (c) of cl. (1). These matters include the levy and collection by the State of taxes leviable by the Central Government, the grant of financial assistance to the State to make up for loss of revenue due to the transfer of a source of revenue to the Centre, the contribution by the State in respect of payment made by the Central Government of any sum as privy purse to the Ruler of a former Indian State, under ART. 291.

This article only applies to Part B States. The provision is only intended to be of a transitional character. The agreement entered into under this article is to be in force only for a period of ten years from the commencement of the Constitution. Even before the expiry of such period but after a period of five years from the commencement of the Constitution, the President may terminate or modify the agreement after consideration of the report of the Finance Commission.

In connection with this article, reference should be made to the fact that a Committee, known as the Indian States Finance Enquiry Committee, was appointed by the Government of India, when the Constitution was being framed by the Constituent Assembly. The recommendations of this Committee have been substantially adopted in the financial provisions of the Constitution. The main principle adopted has been that in order to effect the financial integration of the States, which were previously Native States, with the rest of India "Federal" sources of revenue such as income-tax, etc., should be transferred to the Centre. This article is designed to help the States concerned to get over the financial difficulties that might be caused to them during the transitional period, on account of the adoption of this principle.

2. **"Levy and collection of any tax or duty leviable by the Government of India." (Cl. (a)).**—One of the matters in respect of which an agreement may be made under cl. (1) of this article is the levy and collection of any tax or duty leviable by the Government of India. It has been held that a mere agreement accepting the recommendations of the Indian States Finance Enquiry Committee, 1948-1949, which does not specify the particular tax or duty to which it relates, will not be an agreement with respect to the "levy and collection of any tax or duty" within the meaning of cl. (1) (a) of this article.[1]

Article 278 — Note 2

[1] 1953 Raj 145 (148, 149) (Pr 12) [AIR V 40 C 51] : ILR (1953) 3 Raj 128 (FB), *Maharaja Kishangarh Mills Ltd.* v. *Union of India.*

Clause (1) (a) will only apply to a tax or duty *leviable by the Government of India.* This means that at the time when the agreement is entered into, the tax or duty must be leviable *under the law then in force* by the Central Government. It is not enough if merely the tax or duty is one mentioned in the Union List, if actually it is not leviable by the Central Government in the particular Part B State. Thus, under ART. 277, the taxes, which immediately before the commencement of the Constitution were being lawfully levied by and applied for State purposes in any State under State laws, may continue to be levied by the State authorities notwithstanding that the taxes may be mentioned in the Union List. The taxes may be so continued to be levied till the Parliament makes a law to the contrary. The taxes mentioned in ART. 277, therefore, are not leviable by the Government of India till the Parliament makes a provision by law that they must cease to be levied by the State authorities and must be levied by the Central Government. Therefore unless and until Parliament makes such a law and the particular tax in question is covered by such law, an agreement between the Central and State Governments cannot deal with such taxes.[2]

A statutory provision which contravenes an agreement under cl. (1) of this article will be open to objection that it is constitutionally bad.[3]

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[2] 1953 Raj 145 (148, 149) (Pr 12) [AIR V 40 C 51] : ILR (1953) 3 Raj 128 (FB), *Maharaja Kishangarh Mills Ltd.* v. *Union of India.*
[*See* 1953 Madh-B 20 (21, 22, 25, 26) [AIR V 40 C 12] (DB), *Ramprasad* v. *War Profits Tax Officer.* Tax under Gwalior War Profits Tax Ordinance — Levy of — Agreement between President and Rajpramukh — Validity.

Per Shinde C. J. — Article 277 is not relevant in considering whether the War Profits Tax could be assessed and realised for the accounting period that ended on 30-6-46. But the Ordinance is still in force by virtue of Art. 278 (1) (a). The Madhya Bharat authorities for War Profits Tax can assess and realize the War Profits Tax after 26th January 1950 by virtue of Art. 278 (1) (a), and the agreement entered into thereunder. The financial agreement entered into between the President and the Rajpramukh on 25th February 1950 is valid in law. (Paras 3 and 6).

Per Dixit J.—The tax under the Gwalior War Profits Tax Ordinance is a tax which was being lawfully levied by the Madhya Bharat Government immediately before the commencement of the Constitution and as such in view of Art. 277 the Madhya Bharat Government is entitled to continue to levy and collect it after the commencement of the Constitution from the persons liable to pay the tax under the Ordinance. The tax is not a tax leviable in the sense in which the word "leviable" is used in Art. 278 (1) (a). (Paras 19 and 21)].

[3] 1955 Mys 49 (58) (Pr 27) [AIR V 42 C 20] : ILR (1955) Mys 20, *City Tobacco Mart* v. *Income Tax Officer.*

Calculation of "net proceeds", etc.

279. (1) In the foregoing provisions of this Chapter, "net proceeds" means in relation to any tax or duty the proceeds thereof reduced by the cost of collection, and for the purposes of those provisions the net proceeds of any tax or duty, or of any part of any tax or duty, in or attributable to any area shall be ascertained and certified by the Comptroller and Auditor-General of India, whose certificate shall be final.

(2) Subject as aforesaid, and to any other express provision of this Chapter, a law made by Parliament or an order of the President may, in any case where under this Part the proceeds of any duty or tax are, or may be, assigned to any State, provide for the manner in which the proceeds are to be calculated, for the time from or at which and the manner in which any payments are to be made, for the making of adjustments between one financial year and another, and for any other incidental or ancillary matters.

GOVERNMENT OF INDIA ACT, 1935

See NOTE 1 under this article.

JAMMU AND KASHMIR

Article 279 applies to the State of Jammu and Kashmir — The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS.

Proclamation of Emergency—The provisions of this article shall have effect subject to such exceptions or modifications as the President thinks fit — See ART. 354.

Clause (1)—Tax—Interpretation of, see ART. 366 (28).

Clause (1)—Comptroller and Auditor-General of India—See Ch. V of Part V.

Clause (2)—State—Meaning of, see ART. 264 (b).

Synopsis

1. Analogous law.
2. Scope.

1. Analogous law. — This article corresponds to S. 144 of the Government of India Act, 1935, which reads as follows:

"144. (1) In the foregoing provisions of this chapter 'net proceeds' means in relation to any tax or duty the proceeds thereof reduced by the cost of collection, and for the purposes of those provisions the net proceeds of any tax or duty, or of any part of any tax or duty, in or attributable to any area shall be ascertained and certified by the Auditor General of India, whose certificates shall be final.

(2) Subject as aforesaid, and to any other express provision of this chapter, an Act of the Federal Legislature may, in any case where under this part of this Act the proceeds of any duty or tax are, or may be, assigned to any Province or State, or a contribution is, or may be, made to the revenues of the Federal by any State, provide for the manner in which the proceeds of any duty or tax and the amount of any contribution are to be calculated, for the times in each year and the manner at and in which any payments are to be made, for the making of adjustments between one financial year and another and for any other incidental or ancillary matters."

2. Scope. — It has been seen that the Constitution contains various provisions for the assignment of the net proceeds of taxes levied or collected by the Central Government or portions of such net proceeds to States. This article defines what "net proceeds" mean and further provides that the certificate of the Auditor-General shall be final as to what the net proceeds (or part thereof) are.

Under ART. 268 cl. (2), the proceeds of the duties mentioned in cl. (1) of that article are required to be assigned to the State within which they are collected although they are levied by the Central Government under Central laws. Clause (2) of this article lays down *inter alia* how the "proceeds" for the above purpose are to be calculated.

Finance Commission.

280. (1) The President shall, within two years from the commencement of this Constitution and thereafter at the expiration of every fifth year or at such earlier time as the President considers necessary, by order constitute a Finance Commission which shall consist of a Chairman and four other members to be appointed by the President.

(2) Parliament may by law determine the qualifications which shall be requisite for appointment as members of the Commission and the manner in which they shall be selected.

(3) It shall be the duty of the Commission to make recommendations to the President as to—

(*a*) the distribution between the Union and the States of the net proceeds of taxes which are to be, or may be, divided between them under this Chapter and the allocation between the States of the respective shares of such proceeds;

(*b*) the principles which should govern the grants-in-aid of the revenues of the States out of the Consolidated Fund of India;

(*c*) the continuance or modification of the terms of any agreement entered into by the Government of India with the Government of any State specified in Part B of the First Schedule under clause (1) of Article 278 or under Article 306; and

(*d*) any other matter referred to the Commission by the President in the interests of sound finance.

(4) The Commission shall determine their procedure and shall have such powers in the performance of their functions as Parliament may by law confer on them.

JAMMU AND KASHMIR

Article 280 applies to the State of Jammu and Kashmir.—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Clause (1) — Commencement of this Constitution — Meaning of — This Constitution came into force on 26-1-1950—See Art. 394.

Clause (2) — "Parliament may by law determine" — See the Finance Commission (Miscellaneous Provisions) Act, 1951 (33 of 1951) which determines the qualifications requisite for appointment as members of the Finance Commission and the manner in which they shall be selected and prescribes their powers.

Clause (3) (a)—Net proceeds—Meaning of, see Art. 279.

Clause (3) (a)—Tax—Interpretation of, see Art. 366 (28).

Clause (3) (b)—Grants-in-aid of the revenues—See Arts. 273, 275.

Clause (3) (b)—Consolidated Fund of India—Formation of, see Art. 266.

1. Legislation by Parliament.—The Parliament has enacted under cl. (2) of this article the Finance Commission (Miscellaneous Provisions) Act, 1951, laying down the qualifications for the members of the Finance Commission, etc.

2. Distribution between Union and States of proceeds of taxes (Cl. 3 (a)). — See ARTS. 270 and 272 and the commentary thereon.

3. Grants-in-aid (Cl. 3 (b)). — See ARTS. 273 and 275 and the Commentary thereon.

Recommendations of the Finance Commission.

281. The President shall cause every recommendation made by the Finance Commission under the provisions of this Constitution together with an explanatory memorandum as to the action taken thereon to be laid before each House of Parliament.

JAMMU AND KASHMIR

Article 281 applies to the State of Jammu and Kashmir. — The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

Miscellaneous Financial Provisions

Expenditure defrayable by the Union or a State out of its revenues.

282. The Union or a State may make any grants for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislature of the State, as the case may be, may make laws.

GOVERNMENT OF INDIA ACT, 1935.

See NOTE 1 under this article.

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in Art. 282 reference to the State shall be construed as not including reference to the State of Jammu and Kashmir.—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISION

State—Meaning of, see Art. 261 (b).

Synopsis

1. Analogous law.
    - (a) Government of India Act, 1935.
    - (b) United States of America.
    - (c) Australia.
2. Scope of the article.

1. Analogous law.

(a) Government of India Act, 1935.

(a) Government of India Act, 1935

Section 150 of the Government of India Act, 1935, reads as follows:

"150. (1) No burden shall be imposed on the revenues of the Federation or the Provinces except for the purposes of India or some part of India.

1.Ind. Con. S.F. 58.

(2) Subject as aforesaid, the Federation or a Province may make grants for any purpose, notwithstanding that the purpose is not one with respect to which the Federal or the Provincial Legislature, as the case may be, may make laws."

(b) United States of America.

(b) United States of America.

Under Article I Section 8 (1) the "Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States . . . . . ."

(c) Australia.

(c) Australia.

Section 81 of the Commonwealth of Australia Constitution Act runs as follows :

> "All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution."

2. Scope of the article. — This article confers both upon the Union and the State a *spending* power, apart from the legislative power. The article provides that the Union as well as the State can spend monies on any public purpose although the Parliament or the State Legislature, as the case may be, may not have legislative power with regard to such purpose. Thus, under LIST 1, Entry 63, the Benares Hindu University, the Aligarh Muslim University and the Delhi University are matters within the exclusive jurisdiction of the Parliament. Similarly, under Entry 64 of LIST 1 institutions for scientific or technical education financed by the Government of India are matters within the exclusive legislative jurisdiction of the Parliament. Nevertheless, it will be open to the States under this article to contribute funds for the institutions mentioned above.

It will be seen from NOTE 1 that under the American Constitution also, the Congress has power to spend money for "general welfare." The expression "general welfare" has been held to include any matter of general welfare although the matter may be one in respect of which the Congress may not have legislative power.[1] But the only power

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Article 282 — Note 2

[1] (1935) 80 Law Ed. 477 (488) : 297 U. S. 1 (65, 66), *United States v. Butler*. (The power conferred by Art. 1 S. 8 Cl. 1 of the Constitution to lay and spend taxes to provide for the general welfare of the United States is not restricted to the *enumerated* legislative fields committed to Congress by the other provisions of the article but confers a substantive power to tax and appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States).

that is granted is a *spending* power and such power cannot be utilized for the purpose of legislating about the general welfare of the nation with regard to matters falling outside the legislative field of the Congress.[2]

It will be seen that the Indian Constitution has adopted the principle of the American Constitution in regard to the incorporation of the spending power over and above the legislative power of the Union and the States.

The article only authorises the spending of money on a *public purpose.* As to the meaning of public purpose, see ART. 31, NOTE 19.

The administration of the properties of religious endowments is a public purpose and not a private purpose and the expenditure of public money on such purpose is not unconstitutional. It is only the doctrinal and ritualistic aspect of religion that are private.[3]

Custody, etc., of Consolidated Funds, Contingency Funds and moneys credited to the public accounts.

283. (1) The custody of the Consolidated Fund of India and the Contingency Fund of India, the payment of moneys into such Funds, the withdrawal of moneys therefrom, the custody of public moneys other than those credited to such Funds received by or on behalf of the Government of India, their payment into the public account of India and the withdrawal of moneys from such account and all other matters connected with or ancillary to matters aforesaid shall be regulated by law made by Parliament, and, until provision in that behalf is so made, shall be regulated by rules made by the President.

(2) The custody of the Consolidated Fund of a State and the Contingency Fund of a State, the payment of moneys into such Funds, the withdrawal of moneys therefrom, the custody of public moneys other than those credited to such Funds received by

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[*See also* (1937) 301 U. S. 619 (640) : 81 Law Ed. 1307, *Helvering v. Davis.* (Discretion to determine whether expenditure of public money is in aid of general welfare belongs to Congress)].

[2] (1935) 80 Law Ed. 477 (487) : 297 U. S. 1 (64), *United States v. Butler.*

[3] 1954 Mad 385 (393, 394) (Pr 13) [AIR V 41 C 158] : ILR (1955) Mad 356 (DB), *Narayanan Nambudripad* v. *State of Madras.*
[*See also* 1954 SC 282 (295, 297) [AIR V 41 C 68] : 1954 SCR 1005 (SC), *The Commissioner, Hindu Religious Endowments* v. *Lakshmindra Thirtha Swamiar.* (Proper administration of religious trusts and institutions is a secular purpose and is not prohibited by Art. 27)].

or on behalf of the Government of the State, their payment into the public account of the State and the withdrawal of moneys from such account and all other matters connected with or ancillary to matters aforesaid shall be regulated by law made by the Legislature of the State, and, until provision in that behalf is so made, shall be regulated by rules made by the Governor or Rajpramukh of the State.

GOVERNMENT OF INDIA ACT, 1935

See NOTE 1 under this article.

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, cl. (2) of Art. 283 shall be omitted—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Cl. (1)—Consolidated Fund of India—Formation of, see Art. 266.

Cl. (1)—Contingency Fund of India — Establishment of, see Art. 267.

Cl. (1)—"Rules made by the President"— See Ministry of Finance Notification No. 3741-BII/50 dated 31-3-1950 published in the Gazette of India, 1950, Extraordinary, dated 31-3-1950, page 1099.

Cl. (2)—Consolidated Fund of a State and the Contingency Fund of a State —Formation and establishment of, see Arts. 266, 267.

Cl. (2)—State — Meaning of, see Art. 264 (b).

Synopsis

1. Analogous law.
2. Scope of the article.

1. Analogous law—Government of India Act, 1935, S. 151 (1) reads as follows :

> "151. (1) Rules may be made by the Governor-General and by the Governor of a Province for the purpose of securing that all moneys received on account of the revenues of the Federation or of the Province, as the case may be, shall, with such exceptions, if any, as may be specified in the rules, be paid into the public account of the Federation or of the Province, and the rules so made may prescribe, or authorise some person to prescribe, the procedure to be followed in respect of the payment of moneys into the said account, the withdrawal of moneys therefrom, the custody of moneys therein, and any other matters connected with or ancillary to the matters aforesaid."

2. Scope of the article.—The article corresponds to S. 151 (1) of the Government of India Act, 1935, as has been seen in NOTE 1. Although there are points of difference between the two provisions their purpose is the same. The scope and purpose of S. 151 have been explained as follows:

> "The section relates to the custody of public money and its object is that all public monies shall be paid into the revenue of the Federation or the Province as the case may be. This is with a view to regularizing the receipts of money and finally allocating those receipts either to the revenues of the Federation or of the Province. It is desired in the first place to prevent any department making money on its own account. For instance, a department might sell land and then appropriate the proceeds of the sale to its own finances and thereby upset the appropriations that had originally been authenticated for it, or the public works department might buy a piece of land and thereby increase the amount of the grants noted for the purposes of that department. Another object of the clause is to ensure that no Government Officer can keep sums of money in his custody."[1]

Comparing S. 151 of the Government of India Act, 1935, extracted in Note 1, and this article, the following points of differences may be noted :

(i) The Government of India Act, 1935, contemplates only one account, namely, the public account of the Federation or of the Province as the case may be, and all moneys received on account of public revenues are required to be paid into this account. But the new Constitution provides for three separate accounts with regard to public moneys, namely, the Consolidated Fund of India or of the State, as the case may be (Art. 266 (1)), the Public Account of India or of the State (Art. 266 (2)), and the Contingency Fund of India or of the State (Art. 267). All these funds are referred to in this article. As seen in the commentary on Art. 266, the Consolidated Fund is an innovation made by this Constitution on the precedent of the English system. As to the custody, etc., of moneys received by public officers and courts other than revenues, see Art. 284.

(ii) Under this Constitution, the provision that all public moneys must be paid into the Consolidated Fund or the Public Account is a separate and a substantive provision (Art. 266). But under the Government of India Act, 1935, the provision that all public revenues must be paid into the Public Account of the Federation or of the Province and the provision as to rules for the operation of these funds are both contained in the same section.

(iii) Under this article, the regulation of the working of the three funds mentioned above is required to be made by law by

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Article 283 — Note 2

[1] See Par. Deb Vol 300, Cols 1400—1401 — quoted in The Government of India Act, 1935, by N. Rajagopala Aiyangar.

Parliament or the State Legislature. But until such a law is made, the requisite rules may be made by the President or Governor or Rajpramukh of the State. But under the Government of India Act, 1935, S. 151, there is no provision for regulation by law. The regulation is to be made only by rules made by the Governor-General or the Governor, as the case may be.

(iv) Article 284 relates to the custody, etc., of suitors' deposits and other moneys received by public servants and courts. There was no similar provision in the Government of India Act.

Custody of suitors' deposits and other moneys received by public servants and courts.

284. All moneys received by or deposited with—

(a) any officer employed in connection with the affairs of the Union or of a State in his capacity as such, other than revenues or public moneys raised or received by the Government of India or the Government of the State, as the case may be, or

(b) any court within the territory of India to the credit of any cause, matter, account or persons,

shall be paid into the public account of India or the public account of the State, as the case may be.

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in Art. 284 reference to the State shall be construed as not including reference to the State of Jammu and Kashmir. — The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISION

State—Meaning of, see Art. 264 (b).

1. Scope. — Article 266, cl. (1) mentions the items that would go into the Consolidated Fund of India or the State. These items are: All revenues by the Government, all loans raised by the Government and moneys received by the Government in repayment of loans. Under ART. 266, cl. (2) all *other* public moneys received by or on behalf of the Government of India or of the State are to be credited to the Public Account of India or of the State, as the case may be.

The present article deals with items *not* covered by ART. 266. This article covers two items:

(a) all moneys received by or deposited with public officers in their official capacity, but not including public moneys or revenues raised or received by or on behalf of the Government of India or the State; and

(b) moneys received by or deposited with courts in connection with judicial proceedings.

It will be seen that item (a) above excludes public moneys received by or on behalf of the Government. These are provided for by ART. 266, cl. (2). The moneys received by or deposited with public officers, to which this article refers, are not revenues or public moneys raised or received by the Government.

The moneys referred to in this article are to be credited in the Public Account of India (or the State) in the same way as items referred to in ART. 266, cl. (2). The rules or laws that may be made under ART. 283 as to the method of dealing with the Public Account will also apply to the items mentioned in this article.

See also commentary on ART. 283.

Exemption of property of the Union from State taxation.

285. (1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State.

(2) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State.

GOVERNMENT OF INDIA ACT, 1935

See NOTE 1 under this article.

JAMMU AND KASHMIR

Article 285 applies to the State of Jammu and Kashmir — The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS.

State—Meaning of, see Art. 264 (b).
Tax—Interpretation of, see Art. 366 (28).

Synopsis

1. Analogous law.
    - (a) Government of India Act, 1935.
    - (b) United States of America.
    - (c) Australia.
    - (d) Canada.
    - (e) England.
    - (f) Position in India prior to 1-4-1937.
2. Scope of the article.
3. "Property of the Union."
4. Scope of exemption.
5. Doctrine of immunity of instrumentalities.
6. "Save in so far as Parliament may by law otherwise provide."
7. "Any authority within a State".
8. "All taxes".
9. Clause (2).

1. Analogous law.

(a) Government of India Act, 1935.

(a) Government of India Act, 1935.

This article corresponds to S. 154 of the Government of India Act, 1935, while Art. 289 which deals with the exemption of State property from Union taxation corresponds to S. 155 of the Act. Section 154 of the Government of India Act, 1935, is reproduced below :

> "154. Property vested in His Majesty for purposes of the Government of the Federation shall, save in so far as any Federal law may otherwise provide, be exempt from all taxes imposed by, or by any authority within, a Province or Federated State :
>
> Provided that, until any Federal law otherwise provides, any property so vested which was immediately before the commencement of Part III of this Act liable, or treated as liable, to any such tax, shall, so long as that tax continues, continue to be liable, or to be treated as liable, thereto."

(b) United States of America.

(b) United States of America.

There is no express provision in the American Constitution under which federal property is exempt from taxation by the States and *vice versa*. But what is known as the doctrine of immunity of instrumentalities has been developed there which is more than a substitute for an express provision similar to this article and Art. 289. Under this doctrine not only the property of the Central Government but also the agencies and instrumentalities of the Central Government are exempted from State taxation. A corresponding exemption from federal taxation is accorded to the properties and instrumentalities of the State.

(See Art. 246, Note 13).

(c) Australia.

(c) Australia.

Section 114 of the Commonwealth of Australia Constitution Act, 1900, provides *inter alia* that "a State shall not, without the consent of the Parliament of the Commonwealth, impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State."

(d) Canada.

(d) Canada.

Section 125 of the British North America Act, 1867, provides as follows: "No lands or property belonging to Canada or any Province shall be liable to taxation."

(e) England.

(e) England.

England being a unitary State there is no question of the powers of the Centre and the units of a federation to tax each other's properties. But it may not be out of place to note the principles there observed regarding the liability of Crown property to taxation. According to these principles, property owned and occupied by the Crown is exempt from taxation unless rendered liable either by express words or necessary implication. Moreover, an express exemption of particular classes of Crown property in a statute is not in itself sufficient to raise the implication that such property only is exempt and that other property not falling within the exemption is bound, such clauses being inserted merely *ex majore cautela*.[1]

(f) Position in India prior to 1-4-1937.

(f) Position in India prior to 1-4-1937.

Sections 154 and 155 of the Government of India Act, 1935, above mentioned, came into force on 1-4-1937. Prior to that date, the question of liability of Government property to taxation was not governed by any statutory provision. But the principles of English law above referred to, under which Crown property was exempt from taxation unless the law expressly or by necessary implication provided otherwise, were held applicable.[2]

Article 285 — Note 1

[1] Halsbury's Laws of England, 3rd Edition (Simonds), Vol. 7, Pp. 465—466. [*See also* 1948 Cal 116 (2) (121, 122) (Pr 17, 18) [AIR V 35 C 59] : ILR (1948) 2 Cal 85 (DB), *Governor-General in Council* v. *Corporation of Calcutta*.

(1902) 2 KB 73 (80) : 71 LJ KB 479, *Hornsey Urban Council v. Hennell*.
(1883) 9 App Cas 61 (72, 76, 77) : 53 LJ QB 239, *Coomber* v. *Justices of Berks*.

(1842) 152 ER 406 (409) : 11 L J Ex 338, *Attorney General* v. *Donaldson*.]

[2] 1947 PC 34 (35) [AIR V 34 C 7] : 73 Ind App 271 : ILR (1947) Kar (PC) 60 : ILR (1947) Bom 186 (PC), *Bombay Province* v. *Bombay Corporation*.

1950 Cal 421 (422) [AIR V 37 C 157] : ILR (1951) 1 Cal 319 (DB), *Calcutta Corpn.* v. *Bhupalchandra*.
1948 Cal 116 (121, 122) (Pr 17, 18) [AIR V 35 C 59] : ILR (1948) 2 Cal 85 (DB), *Governor General in Council* v. *Corporation of Calcutta*.
1934 Bom 379 (380, 383) [AIR V 21] (DB), *Hiranand* v. *Secy. of State*.
[*See* ('90) ILR 14 Bom 213 (218) (DB), *Secretary of State* v. *Muthurabhai*. (The rule of construction according to which the Crown is not affected by a Statute, unless specially named in it, applies to India.)]
[But see 1955 Cal 282 (288) [(S) AIR V 42 C 78] : 1955 Cri L Jour 792

2. Scope of the article. — This article and the succeeding three articles, that is, ARTS. 286, 287 and 288, impose certain restrictions on the power of taxation of the *States.* Article 289 imposes restriction on the power of taxation by the Centre. Such restrictions on the taxation power of the Centre and the units in a Federation are incidental to the federal form of Constitutions, as such form necessitates a considerable amount of mutual adjustment of the powers of the Centre and the units.

Under this article, Union property is made exempt from State taxation. Under ART. 289, the property and income of States are made exempt from Union taxation. Articles 286, 287 and 288 deal with certain further limitations on the taxing powers of the States.

3. "Property of the Union." — This article raises two questions when exemption from tax is claimed under it :

(i) whether the tax is one on "property", and

(ii) whether such property is vested in the Union.[1]

The word "property" is used in the context without any limitation. Therefore, it will embrace every kind of property.[2]

(DB), *Calcutta Corporation* v. *Director of Rationing.* (Crown or Govt. is bound by statute unless exempted from its operation either expressly of by necessary implication : AIR 1947 PC 34 dissented from; ILR 25 Mad 457 Foll.)

('02) ILR 25 Mad 457 (463, 502) (DB), *Bell* v. *The Municipal Commissioners, City of Madras.* (The Superintendent of the Government Gun Carriage Factory in Madras having brought timber belonging to Government into Madras without taking out a license and paying the license fees prescribed by section 341 of the City of Madras Municipal Act, was prosecuted to conviction by the Municipal Commissioners:

Held, on revision, that timber brought into Madras by or on behalf of Government is liable to the duty imposed by section 341 of the City of Madras Municipal Act (1 of 1884) although Government is not named in the section. According to the uniform course of Indian legislation, Statutes imposing duties or taxes bind Government unless the very nature of the duty or tax is such as to be inapplicable to Government : Dissented from in AIR 1948 Cal 116 (122).)]

Article 285 — Note 3

[1] See 1949 FC 121 (124) [AIR V 36 C 20] : 1949 FCR 368 : ILR (1950) 2 Cal 544 (FC), *Calcutta Corporation* v. *St. Thomas School.* (Case on S. 154 of the Govt. of India Act, 1935, corresponding to this Article.)

[2] 1949 FC 121 (124) (Pr 10) [AIR V 36 C 20] : 1949 FCR 368 : ILR (1950) 2 Cal 544 (FC), *Calcutta Corpn.* v. *St. Thomas School.*

1948 Cal 116 (119) (Pr 8) [AIR V 35 C 59] : ILR (1948) 2 Cal 85 (DB), *Governor General in Council* v. *Corporation of Calcutta.* (*Per Mukherjea J.*— The expression "property" in S. 154 has been used in a perfectly general sense and would include land, building, chattels, shares, debts, and in fact every thing that has a money value in the market and comes within the purview of any taxing statute.)

Buildings erected on land, apart from the land, are "property" within the meaning of this article.[3]

The exemption from tax under this article only applies to property of the Union. The words "property of the Union" imply that the ownership of the property is vested in the Union.[3a] Thus, property which is only requisitioned and not acquired for Government purposes is not property of the Government and the exemption from taxation under this article will not apply to such property.[4] But where certain premises are requisitioned by the Government and subsequently additional buildings are put up by the Government on the same property, the additional buildings will be property of the Government, although the land on which the buildings stand does not belong to the Government. Hence, in such a case, the exemption from taxation under this article will apply to the buildings erected by the Government.[5]

Where Government land is leased to a private person, the leasehold interest is not Government property and hence not exempt from taxation under this article.[6] Conversely, where property is leased to Government, it does not become Government property and a tax on the owner in respect of the property cannot be said to be a tax on Government property.[7] But in such cases, a tax on the leasehold interest will be a tax on Government property and as such will be within the prohibition of this article.[8]

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[3] 1949 FC 121 (124) [AIR V 36 C 20] : 1949 FCR 368 : ILR (1950) 2 Cal 544 (FC), *Calcutta Corpn.* v. *St. Thomas School.* (In India the ownership of a building is not necessarily related to the ownership of land on which the building stands.)

[3a] *See* (1912) 1 KB 690 (697, 698) : 81 LJ KB 683, *Wixon* v. *Thomas.* (Houses acquired by a county association under the Territorial and Reserve Forces Act (1907) for use as residences for non-commissioned officers of the Regular Army employed as instructors of the Territorial force *are occupied by servants of* the Crown for purposes of the Crown and are exempt from liability to the poor rate.)

(1902) 2 KB 73 (80) : 71 LJ KB 479, *Hornsey Urban Council* v. *Hennell.* (Where land is acquired and occupied by Volunteer Corps for military purposes and held under and subject to provisions of the Volunteer Act 1863 and the Military Lands Act 1872 and vested in the Commanding Officer for the time being of the Corps, it is an ownership and occupation for and on behalf of the Crown, not liable to tax unless Crown is expressly mentioned.)

[4] 1949 FC 121 (124) [AIR V 36 C 20] : 1949 FCR 368 : ILR (1950) 2 Cal 544 (FC), *Calcutta Corpn.* v *St. Thomas' School.* (Confirming on appeal AIR 1949 Cal 312 and approving AIR 1948 Cal 116.)

[5] 1949 FC 121 (124) [AIR V 36 C 20] : 1949 FCR 368 : ILR (1950 2 Cal 544 (FC), *Calcutta Corpn.* v. *St. Thomas' School.* (Confirming on appeal AIR 1949 Cal 312 and approving AIR 1948 Cal 116.)

[6] (1916) 2 App Cas 569 (573, 574) : 86 LJ PC 36, *Smith* v. *Vermillion Hills Rural Council.*

(1923) 1923 App Cas 136 (140, 141, 142, 143) : 92 LJ PC 10, *City of Montreal* v. *Attorney General for Canada.*

Succession duty or inheritance tax in respect of property including Government securities is not a tax on Government property and hence not prohibited under this article.[9]

4. Scope of exemption. — The exemption under this article extends only to the tax on property. A tax on succession to property is not a tax on property, but it is a tax upon the right to succeed to property. Hence, where a citizen bequeaths his private property to the State, the succession duty charged on such bequest will not come within the prohibition of this article.[1] Thus, tax on property would seem to denote a tax paid by the owner of property *qua* owner. A tax on transfer of property is not a tax on property. Ownership connotes a state of facts, while transfer connotes a process or an operation effected by parties or by law. Thus, sales tax may be levied on sales of goods to the Government of India.[2]

5. Doctrine of immunity of instrumentalities. — What is exempt from State taxation under this article is the property of the Union, and what is exempt from Union taxation under ART. 289 is the property and income of the States. American Courts have developed a peculiar doctrine, according to which the exemption from mutual taxation by the Federation and the Units extends not only to property and income but also to agencies and instrumentalities of

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7. (1928) 1928 App Cas 117 (122) : 97 LJ PC 11, *Halifax (city)* v. *James P. Fairbanks' Estate.*

8. (1935) 104 LJ KB 611 (614, 615) : (1935) 2 KB 373, *Derbyshire Territorials* v. *S. E. Derby Assnt. Committee.*

(1788) 100 ER 200 (202) : 1 Bott 164, *Amherst* v. *Sommers.* (Stables rented by the Colonel of a regiment by order of the Crown for the use of the regiment the Colonel not using them for his own horses, nor occupying them at all are not liable to be rated to the relief of poor.)

[*See* (1883) 9 App Cas 61 (72, 76, 77) : 53 LJ QB 239, *Coomber* v. *Justices of Berks.* (Occupiers of buildings used as Courts of assize or as County police stations are within the privilege of the Crown and are therefore not liable to be rated under the 1st section of the Act of the 43 Eliz C 2.)]

9. (1900) 178 U. S. 115 (134) : 44 Law Ed. 998, *Plummer* v. *Coler.*

Article 285 — Note 4

1. (1903) 190 U. S. 249 (254, 255) : 47 Law Ed. 1035, *Snyder* v. *Bettman.*
(1896) 163 U. S. 625 (629, 630) : 41 Law Ed. 287, *United States* v. *Perkins.*

2. *See* 1953 SC 252 (264) (Pr 36) [AIR V 40 C 62] : 1953 SCR 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.* (See Bose J.'s judgment where he says that Govt. of India had to *pay Sales Tax on* steel rails purchased for its Railways from Tata Iron & Steel Works at Tatanagar.)

each other. This doctrine is not applicable to the Indian Constitution. For a fuller discussion of this subject, see ART. 246, NOTE 13.

6. "Save in so far as Parliament may by law otherwise provide". — These words show that the bar to taxation of Union property by States is not an absolute one. The bar may be removed in respect of any taxes by law by Parliament. This means in effect that State taxation of Union property is to be subject to the control of Parliament. There was a similar provision in the corresponding S. 154 of the Government of India Act, 1935, making taxation of Federal property by Provinces possible when permitted by Central law. Where Union property is sought to be subjected to State taxation by availing of a Central law permitting such taxation, it is clear that there must be strict compliance with the requirements of Central law.[1] As an instance of a Central law authorising taxation of property of the Central Government by a local authority, reference may be made to S. 3 (1) of the Railways (Local Authorities' Taxation) Act (25 of 1941), which reads as follows:

> "In respect of property vested in the Central Government being property of a Railway, a Railway Administration shall be liable to pay any tax in aid of the funds of any local authority, if the Central Government, by notification in the Official Gazette, declares it to be so liable."

7. "Any authority within a State". — This article makes it clear that the exemption under this article of Union property from State taxation applies not only to taxes levied by the State Government but also to those levied by local authorities.

8. "All taxes." — According to the definition in ART. 366, cl. (28), taxation includes the imposition of any tax or impost, whether general or local or special, and "tax" shall be construed accordingly. So, the word "taxes" in this article has to be given a very wide and comprehensive meaning so as to include all public charges.

Article 285 — Note 6

[1] 1954 All 56 (58) (Pr 3) [AIR V 41 C 40] (DB), *Municipal Board of Kanpur* v. *Dominion of India.* (Where the procedure prescribed in sub-section (2) of S. 3 of the Railways (Local Authorities' Taxation) Act (Act No. 25 *of* 1941) was not followed and neither there was any notification authorising the Municipal Board to charge a certain sum per annum as house tax and water-rate, nor has any person appointed by the Central Government varied the award already given by the officer appointed under S. 135, Railways Act, the Municipal Board cannot claim in its own right to enhance the amount of tax payable by Railway Administration and make a demand and, on failure of the Railway Administration to meet that demand, to issue a distress warrant or threaten to cut off the water supply.)

9. Clause (2).—Clause (2) corresponds to the Proviso to S. 154 of the Government of India Act, 1935. Under this clause where any Union property was liable or treated as liable to pay any tax levied by any local authority, prior to the coming into force of the Constitution, the liability should continue until Parliament by law otherwise provides. The object obviously is to avoid the financial embarrassment that may be caused to local authorities by being suddenly deprived of their accustomed sources of revenue. It will be noticed that cl. (2) only refers to taxes levied by "any authority within the State" and not to those levied by a State itself. The Proviso to S. 154, above referred to, was wider and applied to all taxes to which the main part of the section applied.

It was held with reference to the Proviso to S. 154 of the Government of India Act, that it being in the nature of an exception to a general provision must be construed strictly.[1] The same principle will hold good in the case of cl. (2) of this article also.

The liability to taxation which is continued under cl. (2) only applies to the particular property on which the tax was leviable immediately before the Constitution. Where the tax was in respect of the building and additional buildings are put up subsequent to the Constitution, the liability of such additional buildings to taxation will be governed by cl. (1) and not by cl. (2) and the liability to taxation under cl. (2) will be confined to those buildings which were in existence prior to the Constitution. This principle follows from the decision of the Federal Court in *the Corporation of Calcutta* v. *The Governors of St. Thomas' School, Calcutta*[2] decided with reference to the Proviso to the corresponding S. 154 of the Government of India Act, 1935.

Restrictions as to imposition of tax on the sale or purchase of goods.

286. (1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Explanation.—For the purposes of sub-clause *(a)*, a sale or purchase shall be deemed to have taken

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Article 285 — Note 9

[1] 1948 Cal 116 (2) (120) (Pr 11) [AIR V 35 C 59] : ILR (1948) 2 Cal 85 (DB), *Governor-General in Council* v. *Corporation of Calcutta.*

[2] 1949 FC 121 (124) (Pr 10) [AIR V 36 C 20] : 1949 FCR 368 : ILR (1950) 2 Cal 544 (FC). (Confirming on appeal AIR 1949 Cal 312 and approving of AIR 1948 Cal 116.)

place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce:

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951.

(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent.

GOVERNMENT OF INDIA ACT, 1935

"297 (1) No Provincial Legislature or Government shall—

(*a*) by virtue of the entry in the Provincial Legislative List relating to trade and commerce within the Province, or the entry in that list relating to the production, supply, and distribution of commodities, have power to pass any law or take any executive action prohibiting or restricting the entry into, or export from, the Province of goods of any class or description: or

(*b*) by virtue of anything in this Act have power to impose any tax, cess, toll, or due which, as between goods manufactured, or produced in the Province and similar goods not so manufactured or produced, discriminates in favour of the former, or which, in the case of goods manufactured or produced outside the Province, discriminates between goods manufactured or produced in one locality and similar goods manufactured or produced in another locality.

(2) Any law passed in contravention of this section shall, to the extent of the contravention, be invalid."

JAMMU AND KASHMIR

Article 286 applies to the State of Jammu and Kashmir.—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Clause (1)—Goods—Interpretation of, see ART. 366 (12).

Clause (1)—State—Meaning of, see ART. 264 (b).

Clause (1)—Tax—Interpretation of, see ART. 366 (28).

Clause (2), Pro.—Commencement of this Constitution — Meaning of—This Constitution came into force on 26-1-1950—See ART. 394.

Clause (2), Pro.—"President may by order direct"— See the Sales Tax Continuance Order, 1950, made by the President under Notifn., C. O. 7 dated 26-1-1950 published in the Gazette of India, Extra., dated 26-1-1950, page 670.

Synopsis

1. Comparative law.
    - (a) Government of India Act, 1935.
    - (b) American Constitution.
2. Scope and object of the article.
    - (a) General.
    - (b) This article and Art. 304.
    - (c) Sale of goods to Government.

2a. Interpretation of the article : Previous State of law, relevancy of.

3. Inter-State sales — Taxation by delivery State—(Cl. (1), (a), Explanation and cl. (2)).
    - (aa) Introductory : Change in legal position — Supreme Court overrules its previous decision.
    - (a) Change effected by this article.
    - (b) Territorial nexus, basis of taxation under Government of India Act, 1935.
    - (c) Defects of nexus theory.
    - (d) Effect of restrictions introduced by the article.
    - (e) Apparent conflict between cl. (1) (a), Explanation and cl. (2) : Resolution of conflict by Supreme Court.
    - (ee) Questions involved analysed.
    - (f) Whether Explanation to cl. (1) (a) confers on 'delivery' State' power to tax inter-State sale.
    - (g) Whether such power is affected by cl. (2).
    - (h) Freedom of inter-State trade and State power of non-discriminatory taxation.
    - (i) Freedom of inter-State trade whether means preferential treatment for such trade.
    - (j) Support from America for view in *State of Bombay* v. *United Motors.*
    - (k) Dissenting views of Supreme Court Judges in *State of Bombay* v. *United Motors.*
    - (l) Recapitulation : Scope of cl. (1) (a), Explanation and cl. (2).

  - (i) Scope of cl. (1) (a), Explanation: Whether it authorises taxation of sales coming under it.
  - (ii) Scope of cl. (2): Whether it precludes State taxation of sales covered by Explanation.
- (m) Non-delivery State cannot tax.
- (n) Non-resident dealers, taxation of.
- (o) Limitations arising under Sales-tax Acts themselves.
- (p) Place where title passes — Question as to — Importance of.
- (q) Reasoning in *Poppatlal Shah* v. *State of Madras*: Mode of construing Sales-tax Act.
- (r) Place where contract is entered into is immaterial.
- (s) Place where title passes, materiality of.
- (ss) Situs of sale.
- (t) "Dealer", definition of — Importance in regard to taxing jurisdiction.
- (u) Question whether Sales-tax Act authorises taxation of seller or purchaser in case of inter-State sales.
- (v) Above questions only illustrative.
- (w) Sales-tax validation: Retrospective effect of Supreme Court decision in *Bengal Immunity Co.'s case*.
- (x) Whether Art. 301 is a bar to taxation of inter-State sales and purchases — See Commentary on ART. 301.

4. Intra-State sales.
5. Extra-State sales.
6. Nexus theory under the article.
7. The situs of a sale.
8. "Actually delivered as a direct result of such sale or purchase."
9. "For the purpose of consumption in that State."
10. Sale or purchase in the course of inter-State trade or commerce—Clause (2)—General.
    - (a) Prohibitions on sales-tax imposed by article.
    - (b) Inter-relation between cl. (1) (a) read with Explanation and cl. (2).
    - (c) Applicability of Explanation to cl. (1) (a) material only for purpose of taxing power of delivery State.
    - (d) Where Explanation to cl. (1) (a) does not apply inter-State sale cannot be taxed by any State.
    - (dd) Lifting of ban under cl. (2) by Parliament.
    - (e) Effect of Proviso to cl. (2).
    - (f) Onus of proof.
11. Sale in course of inter-State trade or commerce—Meaning.
12. Taxation of intra-State, extra-State and inter-State sales—Illustrative cases.
13. Sales and purchases in course of import and export — Tax on (cl. (1) (b)).
    - (a) Object of cl. (1) (b).
    - (b) Clause (1) (b) whether redundant.
    - (c) Exemption applies though sale takes place within the State.
    - (d) 'Sale' or 'purchase' may take place either in export or import.
    - (e) Scope and meaning of clause: Effect of Supreme Court decisions.
    - (f) Four views as to scope and meaning of clause.
    - (g) How above views were dealt with by Supreme Court.
    - (h) Summing up of effect of the two decisions.
    - (i) Reasoning on which conclusions of Supreme Court were based.
    - (j) First proposition: Clause not limited to sales or purchases while goods are actually in transit — Clause covers export sales and import purchases.
    - (k) Argument as to redundancy answered.

  - (l) Etymological sense of "course" not to be overemphasised.
  - (m) The "stream" theory of America not applicable.
  - (n) The second proposition: Purchase for purpose of export and sale after import not covered by clause.
  - (o) Argument of double taxation met.
  - (p) Practical difficulties in extending exemption.
  - (q) Commercial practice as to export-import trade.
  - (r) Balancing of conflicting objectives.
  - (s) The third proposition: Sales and purchases while goods are actually in transit.
  - (t) Dissenting view of S. R. Das, J., regarding second proposition.
  - (u) Clause does not cover series of transactions preceding export or following import.
  - (v) Purchase for manufacture and export—Clause not applicable.
  - (w) Tax on purchase not bad though tax is imposed only on goods being exported.
14. Sales and purchases in course of export or import — Liability to tax — Illustrative cases.
15. Retrospective operation of the article.
  - (a) Sales-tax Laws Validation Act, 1956.
16. Proviso to cl. (2)—See NOTES 10 and 15.
17. Essential goods — Exemption as to—Clause (3).
18. Validity of sales-tax laws.
  - (a) Introductory: Grounds of attack classified.
  - (b) Absence of legislative power: Relevant legislative entry.
  - (c) Whether pre-Constitution Acts taxing purchases were *intra vires*.
  - (d) Encroachment on Central field: Sales-tax not same as excise duty.
  - (e) No power to tax mere agreements to sell.
  - (f) Forward contracts.
  - (g) Hire-purchase agreement.
  - (h) Objection as to extra-territoriality.
  - (i) Ground based on infringement of Fundamental Rights.
  - (j) Unconstitutional delegation of legislative power.
  - (k) Infringement of Art. 286.
  - (l) Principles laid down by Supreme Court.
  - (m) Rules under Act can be considered in deciding validity of Act.
  - (n) Principle of severability may be extended to separability in enforcement.
  - (o) Provision authorising taxation of sale merely on basis of existence of goods in State or their being produced or manufactured there is *ultra vires*.
  - (p) Question of convenience or inconvenience of collection of sales-tax.
  - (q) Single assessment for period both before and after Constitution—Validity.
19. Sales-tax and Art. 14.
20. Constitutional remedies for illegal taxation.
21. Nature of sales-tax.
22. American decisions.
  - (a) Stream theory.
  - (b) Doctrine of original package.
23. "Stream theory"—See NOTES 13 (m) and 22.
24. Doctrine of original or unopened package—See NOTE 22.

1. Comparative law.

(a) Government of India Act, 1935.

(a) Government of India Act, 1935.

There was no corresponding section in the Government of India

Act, 1935, imposing restrictions on the power of the State Legislature to impose taxes on the sale of goods.

Under the Government of India Act, 1935, as under this Constitution, taxes on the sale of goods constituted an exclusive Provincial subject of legislation under LIST 2, Item 48 of Sch. VII of the Act. The distribution of legislative power between the Centre and the Provinces in regard to trade and commerce, import and export, production, supply and distribution of goods, export and import duties was also similar to the distribution of legislative power between the Centre and the units under this Constitution. Thus, under the Government of India Act, 1935, LIST 1, Item 19 (Import and Export across customs frontiers) corresponded to LIST 1, Entry 41 (Trade and Commerce with foreign countries; import and export across customs frontiers; definition of customs frontiers) in this Constitution.

Similarly, Government of India Act, 1935, LIST 1, Item 44 (Duties of custom including export duties) corresponded to LIST 1, Entry 83 of the present Constitution.

Taking the Provincial List (LIST II) in the Government of India Act, 1935, Item 26, (Trade and commerce within the Province), Item 29 (Production, supply and distribution of goods), Item 49 (Cesses on entry of goods into a local area for consumption, use or sale therein) corresponded to LIST 2, Entries 26, 27 and 52 of the present Constitution.

List I, Entry 42 (Inter-State trade and commerce) is, however, a new feature in this Constitution.

It will be seen from the above that, generally speaking, both under the Government of India Act, 1935, and this Constitution, foreign trade is committed to the exclusive care of the Centre, while trade and commerce within the Province constitute an exclusive Provincial subject of legislation and under both the Government of India Act, 1935, and the present Constitution, tax on sale of goods is a Provincial subject. But the present Constitution has made an important departure in enacting ART. 286 and imposing thereby certain definite limitations on the power of the State Legislature to impose taxes on sales and purchases of goods.

But under S. 297 of the Government of India Act, 1935, the Provincial Legislature was prohibited from imposing restrictions on inter-Provincial trade and also from levying discriminatory taxes on goods manufactured or produced in a different Province.[1] The subject-

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Article 285 — Note 1

[1] 1953 S C 333 (341) [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav.-Co. 1 (SC), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory*. (Per *S. R. Das J.* — S. 297, Government of India Act, 1935, obviously was inserted for the purpose of achieving, as far as possible, free trade within India by preventing the Provinces from checking or hampering the distribution of goods

matter of this section is now covered by PART XIII (ARTS. 301-307) of the Constitution. Thus, the scope of S. 297 was quite different from this article.

As will be seen in NOTE 3, the absence of any section corresponding to this article led to a twofold evil where a person in one Province sold goods to a person in another Province. Firstly, it led to the same transaction being taxed by several Provinces, and secondly, it caused a great deal of uncertainty as to which Province had the power of taxing the sale. This, naturally, hampered inter-Provincial trade and commerce.

The present article, *inter alia*, seeks to remedy these defects.[2] (See NOTE 3.)

(b) American Constitution.

(b) American Constitution.

The restrictions under this article on the power of the State Legislature to impose taxes on inter-State sales and on sales in the course of exports and imports out of India are comparable to similar restrictions on the power of taxation of the States under the American Constitution, although the principles evolved under the American Constitution in regard to such restrictions are not wholly applicable to the restrictions under this article because of the difference in the language of the relevant provisions of the American Constitution.[3] (See NOTE 16.)

The above-mentioned restrictions under the American Constitution are derived from what are known as the commerce clause and import and export clause of the American Constitution. The commerce clause is contained in ART. I, S. 8, cl. (3), under which the

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or from setting up barriers against internal trade in India regarded as one economic unit.)

[2] 1955 S C 661 (675) (Pr 23) [AIR V 42 C 101]: (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.* (After quoting a passage from the judgment of Patanjali Sastry C. J. in *AIR 1953 S C 252 (S C)* Das Ag. C. J. observed : "The above passage quite adequately depicts the picture of chaos and confusion that was brought about in inter-State trade or commerce by indiscriminate exercise of taxing power by the different Provincial Legislatures founded on the theory of territorial nexus between the respective Provinces and the sales or purchases sought to be taxed. It was to cure this mischief of multiple taxation and to preserve the free flow of inter-State trade or commerce in the Union of India regarded as one economic unit without any Provincial barrier that the Constitution makers adopted Art. 286 in the Constitution" — According to Jagannadhadas J. in the same case (Pr. 134) the picture of multiple taxation in the previous regime has been overdrawn in the majority judgment.)

[3] 1952 S C 366 (368) (Pr 15) [AIR V 39] : ILR (1953) Trav-Co 337 : 1952 S C R 1112 (SC), *State of Travancore-Cochin* v. *Bombay Co. Ltd.*
[*See* 1953 Mad 116 (120) [AIR V 40 C 36] (DB), *Govindarajulu Naidu & Co.* v. *State of Madras.* (*Note*—The judgment of Venkatarama Ayyar J. contains a review of several American decisions bearing on the commerce clause and export import clause.)]

"Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes."

The import and export clause is contained in ART. I, S. 9, cl. (5) and ART. I, S. 10, cl. (2). Article I, S. 9, cl. (5) reads as follows: "No tax or duty shall be laid on articles exported from any State." Article I, S. 10, cl. (2) reads as follows: "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to revision and control of the Congress."

According to Venkatarama Ayyar J., of the Supreme Court in *Bengal Immunity Co.* v. *State of Bihar*,[4] the Explanation to cl. (1) (a) and cl. (2) have been inspired by the American law on the subject, and their spheres of operation correspond respectively to the jurisdiction of the State and that of the Congress in America as delineated in "*Missouri ex. rel. Barrett* v. *Kansas Natural Gas Co.*[5] and *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana.*[6] On this reasoning he held, differing from the view of the majority in the case and agreeing with the view of the majority in the previous decision of the Supreme Court, *State of Bombay* v. *United Motors (India) Ltd.*,[7] that the article did not bar the imposition of a sale-tax by a State on a sale of goods by a person in another State provided the goods were actually delivered, as a direct result of the sale, for *consumption* in the taxing State, because according to him, such taxation would be constitutional under the American Constitution.

(a) General.

2. Scope and object of the article. — As seen in NOTE 1, there was no corresponding section in the Government of India Act, 1935, imposing limitations on the power of the Provincial Legislature under SCH. VII, LIST 2, Item 48 of the Act to levy taxes on the sale of goods. This article imposes certain definite restrictions on the power of the State Legislature to levy taxes on the sales and purchases of goods.[1] These restrictions are four in number and are as follows:[2]

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[4] 1955 S C 661 (732) (Pr 158) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC).

[5] (1923) 68 Law Ed 1027 : 265 U S 298.

[6] (1947) 92 Law Ed 128 : 332 U S 507.

[7] 1953 S C 252 [AIR V 40 C 82] : 1953 S C R 1069 (SC).

Article 286 — Note 2

[1] 1955 S C 661 (676) (Pr 24) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar*. (Per *Das*, *Ag. C. J.*—(Majority view)— "The marginal note to the article is "Restrictions as to imposition of tax on the sale or purchase of goods" which, unlike the marginal notes in Acts of the British Parliament, is part of the Constitution as passed by the Constituent Assembly, and *prima facie* furnishes some clue as to the meaning and purpose of the

(i) No law of a State can impose or authorise the imposition of a tax on a sale or purchase which takes place outside the State. (Cl. (1) (a)).

(ii) Similarly, a State cannot tax a sale or purchase which takes place in the course of inter-State trade or commerce. (Cl. (2).)

(iii) A State cannot tax a sale or a purchase which takes place in the course of export out of, or import into, India. (Cl. (1) (b).)

(iv) Where any goods have been declared by law by Parliament to be essential for the life of the community, no law for the taxation of the sale or purchase of such goods passed by the Legislature of a State shall have effect unless it has been reserved for the consideration of the President and has received his assent. (Cl. (3).)

The above restrictions are distinct and mutually *independent.*[3] They are not mutually *exclusive* but are to be applied cumulatively.

In *Bengal Immunity Co.* v. *State of Bihar*,[4] Das, Ag. C. J., observed as follows:

> "It should be noted that these are four separate and independent restrictions placed upon the legislative competency of the States to make a law with respect to matters enumerated in Entry 54 of List 2. In order to make the ban effective and to leave no loop-hole the Constitution-makers have considered the different aspects of sales or purchases of goods and placed checks on the legislative power of the States at different angles. Thus, in cl. (1) (a) of ART. 286 the question of the *situs* of a sale or purchase

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article. Apart from the marginal note, the very language of the article makes it abundantly clear that its object is to place restrictions on the legislative power of the States with respect to the imposition of taxes on the sales or purchases of goods.")

2. 1955 S C 661 (Pr 24) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

1953 S C 333 (352) (Pr 59) [AIR V 40 C 78) : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC). *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory.*

3. 1955 S C 661 (687) (Pr 48) [AIR V 42 C 101]: (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.* (Until and unless Parliament provides otherwise by law, cl. (2) will ban State taxation of an inter-State sale even though such taxation by the 'delivery' State may be permissible under cl. (1) (a) read with the Explanation.)

1955 S C 765 (769) (Pr 9) [(S) AIR V 42 C 106] : (1955) 2 S C R 483 (SC), *Ram Narain Sons Ltd.* v. *Assistant Sales Tax Commissioner.* (President's order under Proviso to cl. (2) will not validate taxation contrary to cl. (1) (a) read with Explanation, i. e., taxation of inter-State sale, by State other than that in which the goods are actually delivered for consumption.)

4. 1955 S C 661 (676, 677) (Pr 24) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC).

engaged their attention and they forged a fetter on the basis of such *situs* to cure the mischief of multiple taxation by the States on the basis of the *nexus* theory.

"In cl. (1) (b) they considered sales or purchases from the point of view of our foreign trade and placed a ban on the States' taxing power in order to make our foreign trade free from any interference by the States by way of a tax impost. In cl. (2) they looked at sales or purchases in their inter-State character and imposed another ban in the interest of the freedom of internal trade. Finally, in cl. (3) the Constitution-makers' attention was rivetted on the character and quality of the goods themselves and they placed a fourth restriction on the States' power of imposing tax on sales or purchases of goods declared to be essential for the life of the community.

"These several bans may overlap in some cases but in their respective scope and operation they are separate and independent. They deal with different phases of a sale or purchase but, nevertheless, they are distinct and one has nothing to do with and is not dependent on the other or others. The States' legislative power with respect to a sale or purchase may be hit by one or more of these bans. Thus, take the case of a sale of goods declared by Parliament as essential by a seller in West Bengal to a purchaser in Bihar in which goods are actually delivered as a direct result of such sale for consumption in the State of Bihar. A law made by West Bengal without the assent of the President taxing this sale will be unconstitutional because

(1) it will offend ART. 286 cl. (1) (a) as the sale has taken place outside the territory by virtue of the Explanation to cl. (1) (a);
(2) it will also offend ART. 286 cl. (2) as the sale has taken place in the course of inter-State trade or commerce; and
(3) such law will also be contrary to ART. 286 cl. (3) as the goods are essential commodities and the President's assent to the law was not obtained as required by cl. (3) of ART. 286.

This appears to us to be the general scheme of that article."

Again, in the same judgment at page 680 of A. I. R. 1955 S. C. Das, Ag. C. J., observed :

"In some cases the ban is absolute as, for example, with regard to outside sales covered by cl. (1) (a) read with the Explanation, or with regard to imports and exports covered by cl. (1) (b) and in some cases it is conditional, e.g., in the cases of inter-State sales or purchases under cl. (2) which is, in terms, made subject to the Proviso thereto and also to the power of Parliament to lift the ban. Again, in some cases the bans may overlap but nevertheless, they are distinct and independent of each other. The operative provisions of the several parts of ART. 286, namely, cl. (1) (a), cl. (1) (b), cl. (2) and cl. (3) are manifestly intended to deal with different topics and, therefore, one cannot be projected or read into another."

Viewed in the background of the state of the law immediately before the Constitution it will be seen that the article was enacted for the purpose of curing the mischief of multiple taxation and preserving the free flow of inter-State trade and commerce in the Union of India regarded as one economic unit without any Provincial barriers.[5]

The scheme of distribution of legislative power between the Centre and the States as to matters pertaining to trade and commerce has already been referred to in NOTE 1. Broadly speaking, internal trade in each State has been made the concern of the State, while inter-State trade and commerce and foreign trade have been committed to the care of the Centre. In accordance with this scheme, while this article leaves unfettered power of taxation to the States in respect of purely domestic transactions, it prohibits the State from taxing sales and purchases which take place in the course of inter-State trade and commerce or in the course of export and import out of India.

At the same time, taxes on the sale and purchase of goods which have been placed within the jurisdiction of the States are an important source of State revenue and hence they should not be unduly cut down.

Hence, power is reserved to Parliament under cl. (2) to lift, wholly or partially, the ban on taxation of inter-State sales. The clause also contains a Proviso giving power to the President to permit the taxation of such sales until 31st March 1951 where they were being lawfully taxed by any State immediately before the Constitution. In *State of Bombay* v. *United Motors India Ltd.*,[6] the Supreme Court was also impressed by the consideration that State finances should not be unduly curtailed. This was one of the reasons which led the majority of the Judges in that case to hold that cl. (2) (prohibiting State taxation of inter-State sales and purchases) would not preclude a State from taxing sales under which the goods were actually delivered within the State for purposes of consumption therein. [But this view has subsequently been reversed by the Supreme Court in

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[5] 1955 S C 661 (676) [AIR V 42 C 101] : (1955) 2 S C R 603 (S C), *Bengal Immunity Co.* v. *State of Bihar.* (It is not the only purpose of the article t' eliminate multiple taxation — Clause (2) puts an absolute ban on taxation inter-State sales till Parliament lifts the ban.)

[6] 1953 S C 252 (260) (Pr 22) [AIR V 40 C 62) : 1953 S C R 1069 (S C).

Bengal Immunity Co. v. *State of Bihar.*[7]] It may also be pointed out that the prohibition against the taxation of sales and purchases in the course of import and export outside India has been held not to extend to transactions anterior to the export or subsequent to the import although they may be intimately bound up with such exports or imports, so as to be capable of being regarded as taking place in the course of export or import if a broad view is taken of the scope of export and import business according to the prevailing commercial practice.[8] (See for further discussion NOTE 10.)

As interpreted by the Supreme Court in *State of Bombay* v. *United Motors (India) Ltd.*,[9] the article represents a compromise between somewhat conflicting objectives, namely, on the one hand, the necessity of strengthening State finances so as to enable the States to meet the growing demands on their resources in fulfilling their multi-sided responsibilities in the achievement of a welfare State; and, on the other, the promotion of national unity and the building of the whole country as one economic unit without internal barriers and, secondly, the development of foreign trade without being subjected to the double burden of Central and State taxation. [On this reasoning, it was held by the Supreme Court in the above case that though the article imposed a qualified ban on the taxation of inter-State sales, it permitted such taxation in cases in which the goods were actually delivered in the taxing State for consumption therein. This view, however, has been overruled by the Supreme Court in *Bengal Immunity Co.* v. *State of Bihar.*[10]]

The article has also a clarificatory aspect. Under the Government of India Act, in the absence of a provision like this article, the question whether a State has the power to tax a sale or purchase having inter-State elements, depended entirely on the question whether there was sufficient territorial connection between the taxing State and the sale or purchase sought to be taxed,[11] according to the principle laid down in *Wallace Brothers and Co. Ltd.* v. *The Commissioner of Income-tax, Bombay,*[12] which principle is also applicable to sales-tax.[13]

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[7] 1955 S C 661 [AIR V 42 C 101] : (1955) 2 S C R 603 (S C).

[8] *See* 1953 S C 333 (337) [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (S C), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory.*

[9] *See* 1953 S C 252 (256) [AIR V 40 C 62] : 1953 S C R 1069 (SC).

[*See also* 1953 S C 333 (337) [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory.* (The problem before the Constitution makers was one of balancing and reconciling the rival claims of foreign trade in the interests of our national economy and of the State's power of taxation in the interests of the expanding social and welfare needs of the people committed to its charge.)]

[10] 1955 S C 661 (687) (Pr 48) [AIR V 42 C 101] : (1955) 2 S C R 603 (S C).

[11] 1953 S C 252 (256) (Pr 9) [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.*

There was no definite and conclusive test that could be applied to all cases as to what would constitute sufficient territorial connection to confer taxing power on a State. This led to a position of great uncertainty as to which out of several States, with which a sale or purchase could be said to have a territorial connection, had the power to tax it. This uncertainty has now been removed by this article which prohibits the taxation of such sales or purchases by all States except that in which the goods are actually delivered for consumption therein.[14]

The above provision in the article has also the effect of avoiding multiple taxation of the same transaction by different States, which was possible under the Government of India Act, 1935.[15] (See also NOTE 3 for a discussion of the object of the article.)

(b) This article and Article 304.

Under ART. 304, cl. (a), the Legislature of a State is empowered, notwithstanding the provisions of ARTS. 301 and 303 (which are intended to ensure the freedom of inter-State trade and commerce), to impose non-discriminatory taxes on goods imported from another State. In holding that the State in which the goods are delivered for consumption therein can tax a sale or purchase although the property in the goods may pass outside the State, the Supreme Court in *State of Bombay* v. *United Motors (India) Ltd.*,[16] gave as one of its reasons that such a construction of the article alone is consistent with the power of the State to impose non-discriminatory taxes on imported goods under ART. 304, cl. (a). According to the Supreme Court in the above case, as the incidence of sales-tax falls ultimately on the consumer, a sales-tax is, in economic quality, practically indistinguishable from a tax on the consumption or use of goods. (See also NOTE 3.) The view taken in the majority decision in the *State of Bombay* v. *United Motors (India) Ltd.*[17] has subsequently been overruled by the Supreme Court in *Bengal Immunity Co.* v. *State of Bihar.*[18] In that case, it was held by a majority of the Judges that until Parliament lifts the ban under cl. (2) on State taxation of sales and purchases in the course of inter-State trade and commerce, a State cannot tax such sales although they may be covered by the Explanation to cl. (1) (a) and consequently be held to have taken place within the taxing State. According to the view of the majority ART. 304 had no bearing on the construction of this article.[19]

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[12] 1948 P C 118 [AIR V 35 C 34] : 75 Ind App 86 : 1948 F C R 1 (P C).

[13] 1953 S C 274 (276) [AIR V 40 C 63] : 1953 Cri L Jour 1105 : 1953 S C R 677 (SC), *Poppatlal Shah* v. *State of Madras.*

1953 S C 252 (256) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

[14] In *State of Bombay* v. *United Motors (India) Ltd.*, A I R 1953 S C 252 (SC), it was held by a majority of the Supreme Court that an inter-State sale could be taxed by the State in which the goods are actually delivered as a direct result of the sale, for purposes of consumption in such State. But this view has been overruled by the Supreme Court in *Bengal Immunity Co.* v. *State of Bihar*, A I R 1955 S C 661 (SC), in which it has been held that until Parliament removes the ban on State taxation of inter-State sales, such sales cannot be taxed at all by any State even though the goods may have been actually delivered for consumption in the taxing State and hence under Explanation to Cl. (1) (a) the sale may be held to have taken place in such State and therefore not affected by the ban imposed by Cl. (1) (a) on taxation of sales taking place outside the taxing State.

[15] 1953 S C 333 (340, 342) (Prs 31 to 36) [AIR V 40 C 78] : 1954 S C R 53 : I L R (1954) Trav-Co 1 (SC), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory.* (See the judgment of Das J.)

1953 S C 252 (256, 257) (Prs 9, 10, 11) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

[16] 1953 S C 252 (260) (Pr 21) [AIR V 40 C 62] : 1953 S C R 1069 (S C). [But see 1953 S C 333 (345) [AIR V 40 C 78] : 1954 S C R 53 : I L R (1954) Trav-Co 1 (SC), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut*

See Commentary on ART. 301 for a discussion of the question whether the imposition of a tax on sales and purchases in the course of inter-State trade and commerce would be a violation of the freedom of inter-State trade and commerce guaranteed by that article.

(c) Sale of goods to Government.

The exemptions under ARTS. 285 and 289 do not apply to *sales-tax* and sales of goods to Government are not exempt from sales-tax.[20]

2a. Interpretation of the article: Previous state of law, relevancy of. — In order to properly interpret the provisions of this article, it is necessary to consider how the matter stood immediately before the Constitution came into force, what the mischief was for which the old law did not provide and the remedy which has been provided by the Constitution to cure that mischief.[1] (See NOTES 2 and 3 for the objects of the article.)

Factory. (S. R. Das J. expressed his inability to accept the soundness of the above argument.)]

[17] 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (SC).

[18] 1955 S C 661 (687) (Pr 48) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC).

[19] 1955 S C 661 (682) (Pr 34) [AIR V 42 C 101] : (1955) 2 S C R 603 (S C), *Bengal Immunity Co.* v. *State of Bihar.* (Venkatarama Ayyar J., in the *Bengal Immunity Co.'s Case*, however, took the view that taxation by the State in which the goods were actually delivered for consumption was only a tax on the *goods* and the scheme of the Constitution as seen in Arts. 301 and 304 favoured such taxation—In other words he agreed with the reasoning in the majority judgment in AIR 1953 S C 252 (257, 259) (S C)—See Paras 157 and 158 of the judgment in A I R 1955 S C 661 (SC).)

[20] *See* 1953 S C 252 (264) [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.* (See Bose J.'s judgment in which he points out that Government of India had to pay tax on purchase of steel rails bought from Tata Iron and Steel Company.)

Article 286 — Note 2a

[1] 1955 S C 661 (675) (Pr 22) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.* (*Heydon's Case*, (1584) 76 E R 637

(aa) Introductory: Change in legal position—Supreme Court overrules its previous decision.

3. Inter-State sales — Taxation by delivery State — (Cl. (1) (a), Explanation and cl. (2)). — The subject of taxation of inter-State sales and purchases is covered by two clauses of this article, clause (1) (a) read with the Explanation and clause (2). Under clause (1) (a), a State is prohibited from taxing a sale or purchase which takes place outside the State. Explanation to the clause defines what an "outside" sale is for this purpose. The explanation says that for the purpose of cl. (1) (a) a sale or purchase should be deemed to take place in the State in which the goods have been actually delivered for consumption, as a direct result of the sale. Thus, the Explanation makes it clear that States other than the one in which the goods have been actually delivered for consumption cannot tax the sale. The Explanation also makes it clear that so far as the prohibition under cl. (1) (a) is concerned, such prohibition does not apply to the taxation by the State in which the goods are actually delivered for consumption, under the inter-State sale in question.

Then comes cl. (2). This clause states that except as may be otherwise provided by law by Parliament, a sale or purchase which takes place in the course of inter-State trade or commerce shall not be taxed by any State.

The interpretation of the above two provisions has given rise to much conflict of judicial opinion even among Judges of the Supreme Court. The view which was taken by the Supreme Court about such interpretation in *State of Bombay* v. *United Motors (India) Ltd*,[1] has been overruled by it[2] in its subsequent ruling in *Bengal Immunity Co.* v. *State of Bihar*.[3]

The difference between the two rulings is, briefly, as follows:

It will be seen that while under cl. (1) (a) read with the Explanation the State in which the goods are delivered for consumption is *left free* to tax an inter-State sale, cl. (2) enacts a general interdiction

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and *Eastman Photographic Material Co.* v. *Comptroller General of Patents, Designs and Trade Marks*, (1898) 1898 App Cas 571 at p. 576, *Foll.*)

Article 286 — Note 3

[1] 1953 S C 252 (258) (Pr 16) [AIR V 40 C 62] : 1953 S C R 1069 (SC).

[2] The following decisions which followed the *United Motors Case*, AIR 1953 S C 252 (S C) and held that the 'delivery' State could tax the sale notwithstanding cl. (2) must be treated as overruled by *Bengal Immunity Co.* v. *State of Bihar*, AIR 1955 S C 661 (SC).

1955 Andhra 248 (250) (Pr 8) [(S) AIR V 42 C 90] (FB), *Satyanarayana Murthy Brothers* v. *State of Madras.*

1955 All 653 (660) (Pr 27) [(S) AIR V 42 C 189], *Firm Raghubar Dayal* v. *U. P. State.*

1955 Orissa 172 (175) (Pr 12) [(S) AIR V 42 C 47]: ILR (1955) Cut 267 (DB), *B. C. Patel* v. *Sales Tax Officer.*

[3] 1955 S C 661 (687) (Pr 48) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC).

of State taxation of inter-State sales unless and until Parliament should by law remove the ban. According to the earlier ruling of the Supreme Court (*United Motors Case*[4]) notwithstanding cl. (2), the delivery State could tax a sale or purchase in cases coming under the Explanation to cl. (1) (a). This view was based on the ground that the effect of the Explanation to cl. (1) (a) was to make the sale a purely *local* transaction in the delivery State and to remove it from the category of an inter-State sale and that, therefore, cl. (2) did not apply to such cases at all. This view was dissented from and overruled by the Supreme Court in *Bengal Immunity Co.* v. *State of Bihar*[5] in which it held that a sale would not lose its inter-State character merely because it took place within a particular State and that therefore, the effect of the Explanation to cl. (1) (a) was not to remove from the ambit of cl. (2) inter-State sales which under the Explanation are deemed to take place in the "delivery" State. Hence, it was held by the Supreme Court (overruling its earlier view) that unless and until Parliament by law provided otherwise, *all* sales and purchases, whether they were covered by the Explanation to cl. (1) (a) or not, would be immune, under cl. (2), from taxation by any State.[6]

This disposes of the question so far as the ban under cl. (2) of this article is concerned. But the question may be raised whether apart from cl. (2) of this article, ART. 301 (which guarantees freedom of inter-State trade and commerce) would not raise a bar against the taxation of sales and purchases in the course of inter-State trade and commerce. For a discussion of this question, see commentary on ART. 301.

The question under this article may be considered in greater detail now.

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[4] 1953 S C 252 (258, 259) (Prs 16, 17) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*
[*See also* 1953 Orissa 334 (336) (Pr 6) [AIR V 40 C 97] : I L R (1953) Cut 553 (DB), *Sakhigopal Cocoanut Growers Co-operative Society* v. *State of Orissa.*
1953 Pat 87 (92) (Pr 14) [AIR V 40 C 26] : I L R 32 Pat 19 (DB), *Bengal Immunity Co.* v. *State of Bihar.* (The statement in this case, "the explanation to Art. 286 (1) (a) of the Constitution expressly confers upon the State the power to tax sale or purchase of goods which are actually delivered for consumption inside the State" is not correct—The power to tax is not derived from the explanation but from Art. 246 read with List II, Entry 54—See AIR 1953 S C 252 (SC) where Patanjali Sastri specifically points this out.)
1952 Nag 378 (384, 385) (Pr 34) [AIR V 39] : ILR (1953) Nag 332 (DB), *Shriram Gulabdas* v. *Board of Revenue.*]

[5] 1955 S C 661 (687) (Pr 48) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC).

[6] In order to validate levy of tax on sales and purchases in course of inter-State trade and commerce prior to the Supreme Court decision in the *Bengal Immunity Co.'s Case*, (A I R 1955 S C 661 (S C)), the President has promulgated the Sales Tax Validation Act, 1956. This has been given in Note 15.

(a) Changes effected by this article.

Under the Government of India Act, 1935, taxation of sales of goods was a Provincial subject just as it is a State subject under this Constitution. The Government of India Act also contained a provision (S. 297 (1) (a)) for ensuring the freedom of inter-Provincial trade. There was also a provision (S. 297 (1) (b)) prohibiting a Provincial Legislature from imposing discriminatory taxes on goods imported from another Province. But there was no provision in the Government of India Act, 1935, restricting the power of the Provincial Legislature to impose taxes on sales and purchases of an inter-Provincial character. Thus, if *A* in Madras sold goods to *B* in Bombay and the goods were sent to *B* in Bombay from Madras there was no restriction on the power of the Madras Province to tax the sale. Nor was there any restriction on the power of the Bombay Province to tax the sale. But under cl. (2) of this article, such sales and purchases, taking place as they do in the course of inter-State trade and commerce, are immune from taxation by any State, until and unless the Parliament by law lifts the ban under cl. (2).[7] Even if and when the ban under cl. (2) is lifted by Parliament, such sales will be taxable only by the State in which the goods are actually delivered for consumption, and not by any other State. The reason is that cl. (1) (a) of this article prohibits the taxation of a sale or purchase which takes place outside the taxing State and the Explanation to the clause declares that for the purpose of the clause the sale shall be deemed to take place within the State in which the goods have been actually delivered for consumption, which means that the sale shall be deemed to take place *outside all other States.*

(b) Territorial nexus, basis of taxation under Government of India Act, 1935.

But it is necessary to appreciate correctly what the absence of a specific constitutional limitation on the power of imposing a sales-tax under the Government of India Act, 1935, meant. The absence of such specific constitutional limitation did not mean that the power of the Provincial Legislature under SCH. VII, LIST 2, Item 48 of the Government of India Act, 1935, was absolutely untrammelled by any territorial considerations.

The constitutional position was as follows: Under S. 99 (1) of the Government of India Act, 1935, corresponding to ART. 245, cl. (1) of this Constitution, the Provincial Legislature had the power to make laws for the Province or for any part thereof. Under S. 100 (3), corresponding to ART. 246, cl. (3) of this Constitution, the Provincial Legislature had exclusive power to make laws for the Province or any part thereof with respect to any of the matters enumerated in SCH. VII, LIST II of the Act. Item 48 of SCH. VII, LIST 2 was "taxes on the sale of goods and on advertisements." This entry corresponds to Entry 54 of LIST 2 in the Seventh Schedule in this Constitution.

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[7] 1955 S C 661 (680) (Pr 31) [AIR V 42 C 101]: (1955) 2 S C R 603 (S C), *Bengal Immunity Co.* v. *State of Bihar.* (Per Das Ag. C. J., Bose, Imam and Bhagwati JJ.—Jagannadhadas, Venkatarama Ayyar and Sinha JJ. dissenting —Overruling *State of Bombay* v. *United Motors (India) Ltd.* (AIR 1953 S C 252 (S C)) in which it was held that the sale could be taxed by the State in which the goods were actually delivered for consumption in that State.)

It will be seen that the words in the legislative entries, by themselves, do not import any territorial limits or suggest that the sale which is taxed must have taken place within the boundaries of the particular Province or State which seeks to tax it. But under S. 99 (1) and S. 100 (3) of the Government of India Act, referred to above, corresponding to ARTS. 245, cl. (1) and 246, cl. (3) of this Constitution, the power of the Provincial Legislature to make laws with respect to taxes on the sale of goods was confined to the particular Province, and the Provincial Legislature could make such laws only for the particular Province or a part thereof. But the words "for the Province" or "for the State" do not necessarily import that the Provincial Legislature or the State Legislature can make laws with respect to taxes on the sale of goods only where the sale takes place within the borders of the Province or the State. The above words only mean that the law passed by a Provincial or a State Legislature would not be binding on other Provinces or States. In *State of Bombay* v. *United Motors (India) Ltd.*[8] the Supreme Court observed as follows :

> "The Legislature of any State has, under these provisions, the exclusive power to make laws 'for such State or any part thereof' with respect to 'taxes on the sale or purchase of goods other than newspapers'. The expression 'for such State or any part thereof' cannot, in our view, be taken to import into Entry 54 the restriction that the sale or purchase referred to must take place within the territory of that State. All that it means is that the laws which a State is empowered to make must be for the purposes of that State."

In *Poppatlal Shah* v. *State of Madras*,[9] the Supreme Court observed as follows as regards the above-mentioned provisions of Government of India Act, 1935 :

> "The entry does not suggest that a legislation imposing tax on sale of goods can be made only in respect of sales taking place within the boundaries of the Province; and all that S. 100 (3)

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[8] 1953 S C 252 (256) (Pr 9) [AIR V 40 C 62] : 1953 S C R 1069 (S C).

[9] 1953 S C 274 (276) (Pr 6) [AIR V 40 C 63] : 1953 S C R 677 : 1953 Cri L Jour 1105 (SC).

provides is that a law could be passed by a Provincial Legislature for purposes of the Province itself. It admits of no dispute that a Provincial Legislature could not pass a taxation statute which would be binding on any other part of India outside the limits of the Province . . . ."

Under these circumstances, the question arises as to what test should be applied in order to determine whether a particular sales-tax law is *ultra vires* or *intra vires* from the point of view of the territorial jurisdiction of the particular Provincial or State Legislature.

In the absence of any specific constitutional limitation, the principle applicable for determining the question of territorial jurisdiction of a Legislature in regard to taxation laws is that of sufficient territorial *nexus* laid down by the Privy Council in *Wallace Brothers and Co. Ltd.* v. *Commissioner of Income-tax, Bombay.*[10] According to this principle, the existence of sufficient territorial connection between the taxing State and what it seeks to tax is the test of jurisdiction in such cases. The case of *Wallace Brothers and Co.*[11] related to income-tax but the principle laid down by the case is applicable to sales-tax legislation also.[12] Hence, in cases under the Government of India Act, 1935, it was this principle that was applicable for determining the validity of sales-tax legislation from the point of view of the territorial jurisdiction of the Legislature.[13] The same principle applies under the present Constitution also ;[14] but the operation of the principle is limited by the provisions of this article.

The principle of sufficient territorial *nexus* as a basis of the sales-tax legislation does not require that in order to enable a State to tax a sale, the sale must necessarily take place within its borders in the sense that all the ingredients constituting the sale, such as the contract of sale, passing of the title, payment of price, delivery of the goods, should all take place in the taxing State. In *State of Bombay* v. *United Motors (India) Ltd.*[15] Patanjali Sastri, C. J., observed as follows in this connection :

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[10] 1948 P C 118 (121) (Prs 19, 20) [AIR V 35 C 34]: 75 Ind App 86: 1948 FCR 1 (PC).

[11] 1948 P C 118 (121) (Prs 19, 20) [A I R V 35 C 34] : 75 Ind App 86 : 1948 FCR 1 (PC), *Wallace Bros. & Co. Ltd.* v. *Income-tax Commissioner, Bombay.*

[12] 1953 S C 274 (276) [AIR V 40 C 63] : 1953 Cri L Jour 1105 : 1953 S C R 677 (SC), *Poppatlal Shah* v. *State of Madras.*
1953 S C 252 (256) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

[13] 1953 S C 274 (276) [AIR V 40 C 63] : 1953 Cri L Jour 1105 : 1953 S C R 677 (SC), *Poppatlal Shah* v. *State of Madras.*
1953 S C 252 (256) [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.*

[14] 1953 S C 252 (256) [A I R V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.*
See also Article 245 Note 15.

> "In the case of sales-tax it is not necessary that the sale or purchase should take place within the territorial limits of the State in the sense that all the ingredients of a sale like the agreement to sell, the passing of title, delivery of the goods, etc., should have a territorial connection with the State. Broadly speaking, local activities of buying or selling carried on in the State in relation to local goods would be a sufficient basis to sustain the taxing power of the State, provided of course, such activities ultimately resulted in a concluded sale or purchase to be taxed."

(c) Defects of nexus theory

But the conception of sufficient territorial *nexus* is of a nebulous nature as there can be no hard and fast test as to what constitutes sufficient territorial connection. Necessarily, therefore, there was considerable room for uncertainty as regards the question whether in a given case there was sufficient territorial connection between the taxing State and the sale which was taxed. Further, the fact that a sale or purchase could be taxed by any State with which such sale or purchase had a sufficient territorial connection led to the position that the same sale or purchase could be taxed by a number of States, and such multiple taxation of the same transaction necessarily meant the accumulation of the tax burden to the detriment of the consumer on whom ultimately the incidence of the tax fell.[16] It is in this situation that the present article was enacted in the Constitution in order to remedy the above evils.

In this connection, the following passage from the judgment of Patanjali Sastri, C. J., who delivered the judgment of the majority, in *State of Bombay* v. *United Motors (India) Ltd.*[17] may be quoted :

> "In exercise of the legislative power conferred upon them in substantially similar terms by the Government of India Act, 1935, the Provincial Legislatures enacted sales-tax laws for their respective Provinces, acting on the principle of territorial *nexus* referred to above; that is to say, they picked out one or more of the ingredients constituting a sale and made them the basis of their sales-tax legislation. Assam and Bengal made, among other things, the actual

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[15] 1953 S C 252 (256) (Pr 9) [AIR V 40 C 62] : 1953 S C R 1069 (SC).

[16] 1953 S C 333 (341) [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory*. (See observations of S. R. Das J.)

1953 S C 252 (256, 264) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

[17] 1953 S C 252 (256) (Pr 10) [AIR V 40 C 62] : 1953 S C R 1069 (SC).

> existence of the goods in the Province at the time of the contract of sale the test of taxability. In Bihar the production or manufacture of the goods in the Province was made an additional ground. A net of the widest range perhaps was laid in Central Provinces and Berar where it was sufficient if the goods were actually 'found' in the Province at any time after the contract of sale or purchase in respect thereof was made. Whether the territorial *nexus* put forward as the basis of the taxing power in each case would be sustained as sufficient was a matter of doubt not having been tested in a court of law. And such claims to taxing power led to multiple taxation of the same transaction by different Provinces and cumulation of the burden falling ultimately on the consuming public. This situation posed to the Constitution makers the problem of restricting the taxing power on sales or purchases involving inter-State elements, and alleviating the tax burden on the consumer."

In the same case, Bose, J., observed as follows : (at page 264, para. 36 of A I R 1953 S. C.)

> "Before the passing of the Constitution, different States (or Provinces as they then were) claimed the right to tax the same transaction for a variety of reasons which have been pointed out by my Lord the Chief Justice. The result was that the price of certain commodities became inordinately high. Take, for example, the case of steel rails manufactured by the Tata Iron and Steel Works at Tatanagar and purchased by the Government of India for its railways. The Central Government found itself called upon to pay a sale or purchase tax to different States on a single transaction of purchase. I am not sure how many times over, it had to pay, but on the notions then current it was open to Bihar to claim the right to tax because the goods were manufactured there, to Bengal because the transaction of sale took place at Calcutta where the head offices of the Company were, to a third Province because the goods were delivered there and to a fourth because they were 'found' there. It hardly matters whether all or any of this would have stood scrutiny in a court of law because the fact remains that various States were actually taxing the one transaction of sale on the *nexus* theory and a real danger existed of more and more of them coming in to claim a share of the spoils. It seems to me that the Constitution-makers considered this detrimental to the development and exercise of trade and commerce and so determined to put a stop to the practice but at the same time left Parliament a discretion to restore a part of the *status quo* if and when it should think it safe and desirable to do so."

In *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory,*[18] S. R. Das, J., also pointed out how in most of the Provincial Sales-tax Acts, the word "sale" was given an extended meaning by means of explanations so as to enable the tax to be levied even if merely the goods were found in the Province at the time of the contract of sale or were produced or manufactured there, although all the other ingredients of the transaction took place outside.

In *Bengal Immunity Co.* v. *State of Bihar,*[19] S. R. Das, Ag. C. J., quoted with approval the passage from the judgment of Patanjali Sastri, C. J., in the *United Motors' case*[20] (which has been quoted above) and observed :

> "The above passage quite adequately depicts the picture of chaos and confusion that was brought about in inter-State trade or commerce by indiscriminate exercise of taxing power by the different Provincial Legislatures founded on the theory of territorial *nexus* between the respective Provinces and the sales or purchases sought to be taxed. It was to cure this mischief of multiple taxation and to preserve the free flow of inter-State trade or commerce in the Union of India regarded as one economic unit without any provincial barrier that the Constitution-makers adopted Art. 286 in the Constitution."

(d) Effect of restrictions introduced by the article

The next question is, what is the effect of the restrictions enacted in this article on the power of a State to tax sales and purchases having an inter-State character, that is, sales and purchases of goods the ingredients of which take place in more than one State or the parties to which deal with each other from different States? The answer to this question depends upon the interpretation of cl. (1) (a) read with the Explanation to that clause and of cl. (2). With regard to these provisions it was held by the Supreme Court in the *State of Bombay* v. *United Motors (India) Ltd.*[21] that where (for example) *A* in Madras sells goods to *B* in Bombay and the goods are sent from Madras and actually delivered to *B* in the State of Bombay under the sale for consumption in that State, the sale can be taxed by the State of Bombay but cannot be taxed by the State of Madras or by any other State. But this view has been overruled by the Supreme Court in *Bengal Immunity Co.* v. *State of Bihar,*[22] in which it was held (by a majority of the Judges) that "until

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[18] 1953 S C 333 (341) (Pr 32) [AIR V 40 C 78] : 1954 S C R 53 : I L R (1954) Trav-Co 1 (SC).

[19] 1955 S C 661 (675) (Pr 23) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC).

[20] 1953 S C 252 (256) [AIR V 40 C 62] : 1953 S C R 1069 (SC). *State of Bombay* v. *United Motors (India) Ltd.*

[21] 1953 S C 252 (258) (Pr 16) [AIR V 40 C 62] : 1953 S C R 1069 (SC).

[22] 1955 S C 661 (637) (Pr 48) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC).

Parliament by law made in the exercise of the powers vested in it by cl. (2) provides otherwise, no State can impose or authorise the imposition of any tax on sales or purchases of goods when such sales or purchases take place in the course of inter-State trade or commerce and the majority decision in *State of Bombay* v. *United Motors (India) Ltd.*[23] in so far as it decides to the contrary cannot be accepted as founded on principle or authority." In other words, it was held that until Parliament lifted the ban under cl. (2), even the State in which the goods had been actually delivered for consumption could not tax the sale.

(e) Apparent conflict between cl. (1) (a), Explanation and cl. (2): Resolution of conflict by Supreme Court

As already stated, the question involved depends upon cl. (1) (a) read with the Explanation thereto and cl. (2) of the article. Under cl. (2) of the article, except in so far as Parliament may by law otherwise provide, no law of a State shall impose or authorise the imposition of a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce. Thus, on the face of it, cl. (2) seems to enact a prohibition against the taxation by State of sales and purchases of an inter-State character. At the same time, cl. (1) (a) read with the Explanation seems to imply that in the case of inter-State sales, the sale can be taxed by the State in which the goods are delivered for consumption. The question is how to reconcile these apparently conflicting provisions.[24]

Although, on this question, the law as laid down by the Supreme Court in *State of Bombay* v. *United Motors (India) Ltd.*[25] has (as already seen) been reversed by the Supreme Court in its later decision in *Bengal Immuntiy Co.* v. *State of Bihar*[26] it will be instructive to consider the legal position as it was after it was settled by the Supreme Court in *State of Bombay* v *United Motors (India) Ltd,*[27] and the legal position as it is now after the decision of the Supreme Court in *Bengal Immunity Co.* v. *State of Bihar.*[28]

(ee) Questions involved analysed

The Supreme Court (majority decision) in *State of Bombay* v. *United Motors (India) Ltd.*[29] reconciled the provisions of cl. (1) (a) read with the Explanation on the one hand and of cl. (2) on the other as follows :

The Explanation to cl. (1) (a) only applies where under an inter-State sale, goods are actually delivered in another State for consumption in that State. Where the goods are delivered not for consumption but for re-export, the Explanation does not apply. In such a case, therefore, cl. (2) of the article will apply and will bar the taxation of the sale as one which has taken place in the course of inter-State trade or commerce.

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[23] 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (SC).

[24] 1955 S C 661 (730) (Pr 154) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar*, (*Venkatarama Ayyar, J.*—The field on which the Explanation operates falls within the area covered by Art. 286 (2) and there is apparently a conflict between them.)

[25] 1953 S C 252 (258) (Pr 16) [AIR V 40 C 62] : 1953 S C R 1069 (SC).

[26] 1955 S C 661 (687) (Pr 48) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC).

[27] 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (SC).

[28] 1955 S C 661 [AIR V 42 C 101] : (1955) 2 S C R 603 (SC).

[29] 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (SC).

But where in the case of an inter-State sale the goods are delivered under the sale in another State for the purpose of consumption therein, the State in which the goods are so delivered will have the power of taxing the sale and this power is not affected by cl. (2).

Thus, two propositions were involved in the above decision, namely, (i) the delivery State has power to tax an inter-State sale (while all other States are prohibited from doing so), and (ii) this power of the delivery State is not affected by cl. (2). Both these propositions may be considered more fully now.

(f) Whether Explanation to cl. (1) (a) confers on 'delivery' State power to tax inter-State sale

As regards the first proposition, under cl. (1) (a), a State is prohibited from taxing a sale or purchase of goods where such sale or purchase takes place outside the State. Clause (1) (a) has to be read along with the Explanation, which provides that for the purposes of cl. (1) (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State notwithstanding the fact that under the general law relating to sale of goods, the property in the goods has, by reason of such sale or purchase, passed in another State. According to the majority of the Judges in *State of Bombay* v. *United Motors (India) Ltd.*[30] (Patanjali Sastri C. J., B. K. Mukherjea and Ghulam Hasan JJ.), the effect of the Explanation was that in the case of inter-State sales, all States other than the one in which the goods are delivered for consumption therein, are prohibited from taxing the sale, but the State in which the goods are delivered for consumption is *left free* to tax the sale. Patanjali Sastri, C. J., in delivering the judgment of the majority, observed as follows at page 257 (para 12) of A I R 1953 S. C. :

"Having thus provided for the freedom of inter-State trade and commerce subject to the important qualification mentioned above, (the power of the State to impose non-discriminatary tax on imported goods) the authors of the Constitution had to devise a formula of restrictions to be imposed on the State power of taxing sales or purchases involving inter-State elements which would avoid the doubts and difficulties arising out of the imposition of sales-tax on the same transaction by several Provincial Legislatures in the country before the commencement of the Constitution. This they did by enacting cl. (1) (a) with the Explanation and cl. (2) of ART. 286. Clause (1) (a) prohibits the taxation of all sales or purchases which take place outside the State, but a localised sale is a troublesome concept, for, a sale is a composite transaction involving as it does several elements such as agreement to sell, transfer of ownership, payment of the price, delivery of the goods and so forth, which may take place at different places. How, then, is it to be determined whether a particular sale or purchase took place within or outside the State? It is difficult to say that any one of the ingredients mentioned above is more essential to a sale or purchase than the others. To solve the difficulty an easily applicable test for determining what is an outside sale had to be formulated, and that is what, in our opinion, the Explanation was intended to do. It provides by means of a legal fiction that the State in which the goods sold or purchased are actually delivered for consumption therein is the State in which the sale or purchase is to be considered to have taken place, notwithstanding the property in such goods passed in another State. Why an 'outside' sale or purchase is explained by defining what is an inside sale, and why actual delivery and consumption in the State are made the determining factors in locating a sale or purchase will presently appear. The test of sufficient territorial *nexus* was thus replaced by a simpler and more easily workable test: Are the goods actually delivered in the taxing State, as a direct result of a sale or purchase, for the purpose of consumption therein? Then, such sale or purchase shall be deemed to have taken place in that State and outside all other States. The latter States are prohibited from taxing the sale or purchase; the former alone is left free to do so. Multiple taxation of the same transaction by different States is also thus avoided."

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[30] 1953 S C 252 (258) (Pr 16) [AIR V 40 C 62] : 1953 S C R 1069 (SC).
[*See also* 1952 Nag 378 (Pr 52) [AIR V 39] : ILR (1953) Nag 332 (DB), *Shriram Gulabdas* v. *Board of Revenue*. (By virtue of this article sales-tax can only be collected at the market where the goods are delivered for consumption — *Note* : This is one of the High Court decisions which anticipates the Supreme Court decision in the *United Motors' case* : AIR 1953 S C 252 (SC).]
[But see 1953 Mad 116 (127) (Pr 29) [AIR V 40 C 36] (DB), *Govindarajulu Naidu & Co.* v. *State of Madras*. (This case holds that both the delivery State and the selling State can tax the sale where the property in the goods passes in the selling State. This view is no longer good law after the *United Motors' case* : AIR 1953 S C 252 (SC).]

The learned Chief Justice then proceeded to refute the arguments which were advanced to show that the Explanation only meant that the sale in such cases must be deemed to take place in the delivery State and that it did not mean that the sale must be deemed to take place *outside* all other States. In other words, the contention was that not only the delivery State but also the State in which the property in goods passed could tax the sale. This contention was rejected by the majority, the learned Chief Justice concluding as follows (at page 258 (Para 16) of A. I. R. 1953 S. C.):

> "We are, therefore, of opinion that ART. 286 (1) (a) read with the Explanation prohibits taxation of sales or purchases involving inter-State elements by all States except the State in which the goods are delivered for the purpose of consumption therein in the wider sense explained above. The latter State is left free to tax such sales or purchases, which power it derives not by virtue of the Explanation but under ART. 246, cl. (3) read with Entry 54 of LIST 2."

On this aspect of the case the majority view in *Bengal Immunity Co.* v. *State of Bihar*[31] does not materially differ from the majority view in *State of Bombay* v. *United Motors (India) Ltd.*[32] In the *Bengal Immunity Co.'s case*[33] also, the majority view is (i) that *no* State other than the 'delivery' State can tax a sale having inter-State elements[34] and (ii) that even in regard to the 'delivery' State, the Explanation does *not* confer any legislative power on it to tax the sale but only leaves such power unfettered by the restriction imposed by cl. (1) (a).

But there is one point of difference between the two cases. In the *United Motors' case*,[35] it was held by the Supreme Court that the effect of the Explanation to cl. (1) (a) was to impart a statutory *situs* to the sale and locate such *situs* in the delivery State. This view was not acceptable to the majority in the *Bengal Immunity Co's case*,[36] according to whom, to adopt such a construction would be to extend the legal fiction created by the Explanation beyond the purpose for which it was created. The only purpose of the Explanation, according to the majority in *Bengal Immunity Co.'s case*[37] was to define when a sale or purchase should be held to have taken place "outside" a State so as to be exempt it from taxation by such State. The provision as to the sale being deemed to take place in the 'delivery' State must be held to be completely spent when the above purpose is served and cannot be utilised for the purpose of holding that the *situs* of the sale is statutorily located in the 'delivery' State. But the majority in the *Bengal Immunity Co.'s case*[38] has not expressed its final opinion on this point, as in the view it took of the case, it was unnecessary to do so.

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[31] 1955 S C 661 [AIR V 42 C 101] : (1955) 2 S C R 603 (SC).

[32] 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (SC).

[33] 1955 S C 661 [AIR V 42 C 101]: (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

[34] Bhagwati J. in the *United Motors' case* (AIR 1953 S C 252) (SC) had taken the view that both the 'delivery' State and the 'title' State, i. e. the State in which the property in the goods passed could tax the sale. In the *Bengal Immunity Co.'s case.* (A I R 1955 S C 661 (706)) (Pr 97) (SC) he held that his previous view was not correct.

[35] 1953 S C 252 (257, 258) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

[36] 1955 S C 661 (677) (Pr 26) [AIR V 42 C 101] : (1955) 2 S C R 603 (S C), *Bengal Immunity Co.* v. *State of Bihar.*

[37] 1955 S C 661 (677) (Pr 26) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

Basing itself on the view that the Explanation had the effect of locating the sale in the 'delivery' State the majority in the *United Motors' case*[39] proceeded to hold that this had the effect of making the sale a purely intra-State or domestic transaction of the 'delivery' State and therefore removed it from the category of a sale in the course of inter-State trade and commerce, with the result that the ban imposed by cl. (2) on State taxation of sales and purchases in course of inter-State trade and commerce was not applicable to such sales. According to the majority view in *Bengal Immunity Co.'s case*,[40] the *situs* of the sale (even assuming that the Explanation to cl. (1) (a) had the effect of locating the *situs* of the sale in the delivery State) was irrelevant to the question of its inter-State character and hence such sales were governed by cl. (2) of the article and, unless and until Parliament otherwise provided by law, could not be subjected to taxation by any State.

(g) Whether such power is affected by cl. (2)

As regards the second proposition mentioned above, namely, that cl. (2) of the article does not affect the power of a State to tax inter-State sales under which the goods are delivered for purposes of consumption within its borders, the majority decision in the *State of Bombay* v. *United Motors (India) Ltd.*,[41] is (as stated already) based on the reasoning that the legal fiction created by the Explanation to cl. (1) (a), under which the sale is deemed to take place in the delivery State, draws a screen or a mask over the inter-State features of such a sale so that such features must be deemed to disappear for all legal purposes. The result, therefore, according to the majority view, in that case, is that such sales are not in the eye of the law inter-State sales at all, but purely domestic transactions and hence out of the purview of cl. (2).[42] On this part of the case, Patanjali Sastri, C. J., delivering the judgment of the majority of the Court, observed as follows (at p. 259 (Para 17) of A I R 1953 S C):

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[38] 1955 S C 661 [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

[39] 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

[40] 1955 S C 661 (681) (Pr 33) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

[41] 1953 S C 252 (259) (Pr 17) [AIR V 40 C 62] : 1953 S C R 1069 (SC).

[42] 1953 S C 333 (335) [AIR V 40 C 78] : 1954 S C R 53 : I L R (1954) Trav-Co 1 (SC), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory.*
1953 S C 252 (259) (Pr 17) [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.*

> "We are of opinion that the operation of cl. (2) stands excluded as a result of the legal fiction enacted in the Explanation, and the State in which the goods are actually delivered for consumption can impose tax on inter-State sales or purchases. The effect of the Explanation in regard to inter-State dealings is, in our view, to invest what, in truth, is an inter-State transaction with an intra-State character in relation to the State of delivery, and cl. (2) can, therefore, have no application. It is true that the legal fiction is to operate 'for the purposes of sub-cl. (a) of cl. (1)', but that means merely that the Explanation is designed to explain the meaning of the expression 'outside the State' in cl. (1) (a). When once however, it is determined with the aid of the fictional test that a particular sale or purchase has taken place within the taxing State, it follows, *as a corollary*, that the transaction loses its inter-State character and falls outside the purview of cl. (2), not because the definition in the Explanation is used for the purpose of cl. (2), but because such sale or purchase becomes in the eye of the law a purely local transaction. It is said that even though all the essential ingredients of a sale took place within one State and the sale was, in that sense, a purely intra-State transaction it might involve transport of the goods across the State boundary, and that would be sufficient to bring it within the scope of cl. (2). We find it difficult to appreciate this argument. As already stated, the Explanation envisages sales or purchases under which out-of-State goods are imported into the State. That is the essential element which makes such a transaction inter-State in character, and if it is turned into an intra-State transaction by the operation of the legal fiction which blots out from view the inter-State element, it is not logical to say that the transaction, though now become local and domestic in the eye of the law, still retains its inter-State character. The statutory fiction completely masks the inter-State character of the sale or purchase which, as a collateral result of such masking, falls outside the scope of cl. (2)."

The above view also found favour with the minority Judges in *Bengal Immunity Co.'s case.*[43] According to them, the legal fiction

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1955 All 99 (103) (Pr 5) [(S) AIR V 42 C 35], *Kanpur Oil Mills* v. *Judge (Appeals) Sales Tax, Kanpur*. (*Note :* there is an obvious slip in the sentence beginning "When considering . . . . . . commerce" in Para 5, (P 103) of the AIR Report. The words 'not' and 'even' have to be omitted.)

1955 Assam 113 (115) [(S) A I R V 42 C 26] (DB), *Cement Marketing Co. of India* v. *State of Assam.*

1953 Pat 87 (90) (Pr 10) [AIR V 40 C 26] : ILR 32 Pat 19 (DB), *Bengal Immunity Co.* v. *State of Bihar.*

[43] 1955 S C 661 [AIR V 42 C 101]: (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

created by the Explanation, comes into existence after the goods have been delivered in the 'delivery' State and so the sale cannot be held to take place *in the course* of inter-State trade.[44] But the majority of the Judges in the *Bengal Immunity Co.'s case*[45] held that the *situs* of the sale was irrelevant to the question whether the sale took place in the course of inter-State trade and commerce.[46] Das, Ag. C. J., who delivered the ruling judgment, observed at p. 682, para 33 of A I R 1955 S C:

> "If the sales or purchases are in the course of inter-State trade or commerce the stream of inter-State trade or commerce will catch up in its vortex all such sales or purchases which take place in its course wherever the *situs* of the sales or purchases may be. All that the Explanation does is to shift the *situs* from point A in the stream to point X also in the stream. It does not lift the sales or purchases out of the stream in those cases where they form part of the stream.
>
> "The shifting of the *situs* of a sale or purchase from its actual *situs* under the general law to a fictional *situs* under the Explanation takes the sale or purchase out of the taxing power of all States other than the State where the *situs* is fictionally fixed. That is all that cl. (1) (a) and the Explanation do. Whether the delivery State will be entitled to tax such a sale or purchase will depend on the other provisions of the Constitution. The assignment of a fictional *situs* to a sale or purchase has no bearing or effect on the other aspects of the sale or purchase, e.g., its inter-State character or its export or import character which are entirely different topics.
>
> "This fixing of a *situs* for a sale or purchase in any particular State either under the general law or under the fiction does not conclude the matter. It has yet to be ascertained whether that sale or purchase which by virtue of the Explanation has taken place in the delivery State was made in the course of inter-State trade or commerce. For this purpose the Explanation can have no relevancy or application at all."

Under the view (mentioned above) taken by the majority of the Judges in the *United Motors Case*[47] the scope of cl. (2) would be limited to cases of inter-State sales which do not satisfy the requirements of the Explanation to cl. (1) (a), as for instance, cases in which goods are delivered in another State not for purposes of *consumption* therein but for some *other* purpose such as re-export either to another State or outside India. Thus, suppose, A in Madhya Pradesh sells goods to B in Bombay who buys them for purpose of export to Europe and not for the purpose of internal distribution in Bombay. In such a case, it is conceived that under the above ruling of the Supreme Court, cl. (2) will come into play and the sale will not be liable to taxation either by Bombay or Madhya Pradesh.

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[44] See Jagannadha Das J. (P. 720, Pr. 133) and Venkatarama Ayyar J. (Pp. 734, 735) (Prs. 163, 164) in A I R 1955 S C 661 (S C). Sinha J. agreed with the reasoning of *Venkatarama Ayyar J.*

[45] 1955 S C 661 [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

[46] 1955 S C 661 (681) (Pr 33) [A I R V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

[47] 1953 S C 252 (259) (Pr 18) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

In this connection, the following passage from the judgment of the majority in *State of Bombay* v. *United Motors (India) Ltd.*[48] may be quoted :

> "As we have already pointed out, the Explanation does not cover cases of inter-State sales or purchases under which the goods are imported into the State for re-export to other States and possibly other categories of sales or purchases which do not satisfy all the requirements of the Explanation. Whether such transactions are sufficiently numerous for the Constitution to take note of is a matter of opinion and it cannot have much bearing on the question of construction."

As a result of the subsequent ruling of the Supreme Court in the *Bengal Immunity Co.'s case*[49] overruling its earlier decision in the *United Motors Case*,[50] *all* sales and purchases in the course of inter-State trade and commerce whether they are covered by Explanation to cl. (1) (a) or not, will be governed by cl. (2) and hence, they will be immune from State taxation until and unless Parliament by law otherwise provides. Hence, until the Parliament makes such law, the question as to whether a sale or purchase falls under the Explanation to cl. (1) (a) or not will be purely academic.

(h) Freedom of inter-State trade and State power of non-discriminatory taxation

The majority judgment in *State of Bombay* v. *United Motors (India) Ltd.*[51] went on to point out that the view taken by it about the scope of cl. (1) (a) read with the Explanation and cl. (2) was alone consistent with the underlying policy of the Constitution as disclosed in other articles. According to the majority, it was the aim of the Constitution-makers to effect a reconciliation between two objects, namely, freedom of inter-State trade and commerce and State power of taxation. This aim of the Constitution-makers is revealed in the provisions of PART XIII of the Constitution, under which while, on the one hand, the freedom of inter-State trade and commerce is assured, such freedom is expressly subordinated under ART. 304, cl. (a) to the State power of imposing non-discriminatory taxes on goods imported from another State. According to the majority of the Supreme Court in the above case, as the incidence of sales-tax is intended to fall on the consumer, it is essentially a tax on the consumer though it may be collected in the first instance from the dealer. Hence, according to the majority, the sales-tax is, in economic quality, indistinguishable from a tax on the goods. Hence, (it was argued by the majority) it would be inconsistent with the provisions of ART. 304, cl. (a) to hold that the delivery State could not tax the sales and purchases under which goods were imported into its territory for consumption therein from another State.

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[48] 1953 S C 252 (259) (Pr 18) [AIR V 40 C 62] : 1953 S C R 1069 (SC).

[49] 1955 S C 661 (687) (Pr 48) [AIR V 42 C 101]: (1955) 2 SCR 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

[50] 1953 S C 252 (258) (Pr 16) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

[51] 1953 S C 252 (260) [AIR V 40 C 62] : 1953 S C R 1069 (SC).

(i) Freedom of inter-State trade whether means preferential treatment for such trade

The majority of the Supreme Court in the *United Motors' case*[53] also argued that if its view was not accepted, the result would be that out of State dealers, who sent goods (for consumption) to another State, would enjoy an immunity from taxation to which the local dealers of that State would not be entitled and would, therefore, be able to sell cheaper than such local dealers. It was said that such a result would only be a perversion of the principle of freedom of inter-State trade, as such freedom can only imply *equality of treatment* to local traders as well as traders of another State, but cannot mean a fostering of the trade in another State to the detriment of domestic trade.

(j) Support from America for view in *State of Bombay* v. *United Motors*

While delivering the judgment of the majority in the later case of *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory*,[53] Patanjali Sastri, C. J., referred to the earlier case of *State of Bombay* v. *United Motors (India) Ltd.*[54] and pointed out that the view, taken by the majority of the Supreme Court in the latter case, receives support from the fact that even under the American Constitution it was considered that it would be a proper and fair view to take of the powers of taxation of States in regard to sales in inter-State trade and commerce if it could be provided that the States should have the power to tax sales under which goods were imported into their territory for consumption therein, from other States. The learned Chief Justice observed as follows (at pp. 335 and 336 of A. I. R. 1953 S. C.) in this connection :

"With reference to the aforesaid decision, it may be mentioned

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[52] 1953 S C 252 (260) (Pr 21) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

[53] 1953 S C 333 (335) (Pr 8) [A I R V 40 C 78] 1954 S C R 53 : I L R (1954 Trav-Co 1 (SC).

[54] 1953 S C 252 (258) (Pr 16) [AIR V 40 C 62] : 1953 S C R 1069 (SC).

in passing that in order to remedy what was felt to be the unsatisfactory position in regard to the levy of tax by the States in America on sales in inter-State commerce, the North Carolina Department of Revenue proposed that Congress should pass legislation authorising the States to tax certain sales in inter-State commerce. The proposed Bill ran thus :

> 'That all taxes levied by any State upon sales of property or measured by sales of property may be levied upon or measured by sales of property in inter-State commerce by the State into which the property is moved for use or consumption therein, in the same manner and to the same extent that said taxes are levied upon or measured by sales of property not in inter-State commerce. Provided : that no State shall discriminate against sales of property in inter-State commerce; nor shall any State discriminate against the sale of the products of any other state. Provided, further: that no State shall tax the sale in inter-State commerce of property transported for the purpose of resale by the consignee as a merchant or as a manufacturer. Provided, further: that no county, city, or town, or other subdivision of any state shall levy a tax upon or measure any tax by sales of property in inter-State commerce.' See SELECTED ESSAYS ON CONSTITUTIONAL LAW, Vol. 1, Book V, p. 367, Published by the Association of American Law Schools, 1938.

> "It is interesting to note that the Bill sought to bring about substantially the same result as the combined operation of ART. 286, cl. (1) (a), Explanation, cl. (2) and ART. 304, as they were interpreted by the majority in that decision would produce. It is possible that these provisions of our Constitution were inspired by the proposed Bill."

In this connection it may also be pointed out that the 'commerce clause' in the American Constitution (see NOTE 1) has been held by the Supreme Court of America not to preclude State taxation of goods which have been moved into the State in inter-State commerce. In *McGoldrick* v. *Berwind-White Coal Mining Co.*[55] it was held by the Supreme Court of America that the New York City tax laid upon the Pennsylvania Corporation as regards sale of coal for consumption in New York City did not infringe the commerce clause of the Federal Constitution. In delivering the opinion of the Court, Mr. Justice Stone said :

> "Section 8 of the Constitution declares that Congress shall have .... power to regulate commerce with foreign Nations, and

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[55] (1940) 84 Law Ed 565 (569, 570) : 309 U S 33.

among the several States. . . . In imposing taxes for State purposes a State is not exercising any power which the Constitution has conferred upon Congress. It is only when the tax operates to regulate commerce between the States or with foreign nations to an extent which infringes the authority conferred upon Congress, that the tax can be said to exceed constitutional limitations: See *Gibbons* v. *Ogden*,[56] *South Carolina Highway Dept.* v. *Barnwell Bros.*[57] Forms of State taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intra-State commerce and any State tax which discriminates against the commerce, are familiar examples of the exercise of State taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the States. But it was not the purpose of the commerce clause to relieve those engaged in inter-State commerce of their just share of State tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business: *Western Live Stock* v. *Bureau of Revenue*.[58] Not all State taxation is to be condemned because, in some manner, it has an effect upon commerce between the States, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect inter-State commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress."

Venkatarama Ayyar, J., in *Bengal Immunity Co.* v. *State of Bihar*[59] agreed with the above line of reasoning of the majority in *State of Bombay* v. *United Motors (India) Ltd.*[60] He observed as follows (at p. 732 of A I R 1955 S C):

> "Four propositions might accordingly be taken as well settled in American law:
>
> The States have plenary and exclusive power of legislation in respect of intra-State sales.
>
> Regulation of inter-State commerce is a topic within the exclusive jurisdiction of the Congress.
>
> (ii Sales which take place in the course of inter-State trade are local in character and within the jurisdiction of the State, if they are for consumption within the State.
>
> (iv) Where such sales are for other purposes than consumption such as resale, they retain their character as sales in the

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[56] (1824) 6 Law Ed 23 (68) : 9 Wheat (U S) 1 (187).

[57] (1938) 82 Law Ed 734 (738) : 303 U S 177 (185).

[58] (1938) 82 Law Ed 823 (827) : 303 U S 250 (254).

[59] 1955 S C 661 (742) (Pr 184) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC).

[60] 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (SC).

course of inter-State trade and are within the exclusive jurisdiction of the Congress.

"The provisions of the Indian Constitution bearing on this subject may now be referred to :

(a) The States have exclusive jurisdiction under Entry 54 to impose sales-tax and under Entry 26 to regulate trade and commerce within the State. Legislative powers in respect of these matters were conferred on the Provinces by the Government of India Act, 1935, and these powers have been continued in the States by the Constitution.

(b) Article 301 enacts that trade and commerce within the territory of India shall be free, and under Entry 42 in LIST 1, the power to legislate on inter-State trade and commerce is vested exclusively in the Union. There was nothing corresponding to these provisions in the Government of India Act, 1935.

(c) Under the Explanation to ART. 286 (1) (a) a sale is deemed to take place within the State in which the goods are delivered for consumption. This again is a new provision introduced in the Constitution.

(d) No law of a State can impose a tax on a sale which takes place in the course of inter-State trade. That is ART. 286, cl. (2) which is also a new provision.

"Reading side by side the law on the subject both in America and under the Indian Constitution, it is difficult to avoid the conclusion that the Explanation to ART. 286 (1) (a) and ART. 286 (2) have been inspired by the American law on the subject, and that their spheres of operation correspond respectively to the jurisdiction of the State and of the Congress in America as delineated in *Missouri Ex Rel Barrett* v. *Kansas Natural Gas Co.*[61] and *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission.*[62]"

He further observed :

"The result is that with reference to sales for local consumption made in the course of inter-State trade, the law under the Constitution is exactly what it is in America and indeed, the similarity is too striking to be merely accidental. The position may thus be summed up: ART. 286 (2) applies to sales in the course of inter-State trade. The sales which fall within the Explanation are intra-State sales. The grounds covered by the two provisions are distinct and separate. Each has operation within its own sphere, and there is no conflict between them."

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[61] (1924) 68 Law Ed 1027 : 265 U S 298.
[62] (1947) 92 Law Ed 128 : 332 U S 507.

In the view of Jagannadhadas, J., also, a sales-tax or purchase-tax is merely a tax on the *goods.*[63]

But in the view of the majority of the Judges in *Bengal Immunity Co.* v. *State of Bihar,*[64] the fact that the freedom of inter-State trade and commerce guaranteed by ART. 301 was subject to the State power of imposing non-discriminatory taxes on *goods* imported from another State had no bearing on the limitation imposed by cl. (2) of this article on the power of a State to tax *sales and purchases* in the course of inter-State trade and commerce. On this part of the case, the judgment of S. R. Das, Ag. C. J., (the ruling judgment) in the *Bengal Immunity Co.'s case*[65] adopted the reasoning in the dissenting judgments of Bose, J. (pp. 264-265 of A. I. R.) in the *State of Bombay* v. *United Motors (India) Ltd,*[66] of Bhagwati, J., in the same case (p. 273 of A. I. R.), and his own in *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory*[67] (at p. 345 of A. I. R.). The following passage in the dissenting judgment of S. R. Das, J., in the last mentioned case may be quoted to show what the reasoning was :

> "The argument is that the ban imposed by cl. (2) of ART. 286 should, like ART. 301, be subordinated to ART. 304. I am unable to accept the correctness of this argument. Article 301 is expressly made subject to the other provisions of CHAP. XIII which includes ART. 304 but no part of ART. 286 is so subjected. Article 304 (a) gives power to the State Legislature to put a tax on goods imported from other States whereas ART. 286 restricts their taxing power on sale or purchase, i. e., the transaction itself as distinct from the goods. Article 304 appears to me to be closely related to Entry 52 in the State List and restricts the State's powers under that entry but ART. 286 controls the State's powers under Entry 54 in the State List. In the circumstances ART. 304 cannot properly be read into ART. 286."

(k) Dissenting views of Supreme Court Judges in *State of Bombay* v. *United Motors*

It may not be out of place to note here briefly the views of the dissenting Judges in the case of *State of Bombay* v. *United Motors (India) Ltd.*[68] Bose, J., was of the view that merely because the

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[63] 1955 S C 661 (718) (Pr 130) [A I R V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

[64] 1955 S C 661 (682, 685) (Prs 34, 43) [A I R V 42 C 101] : (1955) 2 S C R 603 (SC).

[65] 1955 S C 661 (682) (Pr 34) [AIR V 42 C 101]: (1955) 2 SCR 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

[66] 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (SC).

[67] 1953 S C 333 [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC).

[68] 1953 S C 252 (265) [AIR V 40 C 62] : 1953 S C R 1069 (SC).

Explanation to cl. (1)(a) provided that a sale or purchase under which goods were transported from one State to another must be deemed to take place in the State in which the goods are delivered for consumption therein, such sale does not cease to be one in the course of inter-State trade or commerce and hence, under cl. (2) of the article, such sale is exempt from State taxation, so long as the Parliament does not lift the ban on such taxation as provided in that clause. As already Stated, the Supreme Court by a majority adopted this view in *Bengal Immunity Co.* v. *State of Bihar.*[69]

Bhagwati J., in the *United Motors case*[70] agreed in the main with the conclusions of the majority in that case but differed in his reasoning. According to him, the kind of sales in question must be deemed to take place in the State in which the goods are delivered for consumption. But it could not be said for that reason that the sale did not take place in the State in which the property in the goods passed, so that, according to him, if the Explanation to cl. (1)(a) were taken by itself, the sale would be taxable *both* by the State in which the property passed and the State in which the goods were actually delivered for consumption. But as the sale was one in inter-State commerce, cl. (2) would prevent the taxation of the sale by the State in which the *property in the goods passed*, until and unless Parliament lifted the ban on State taxation of inter-State sales. As regards the power of the State in which the goods were actually *delivered for consumption*, Bhagwati J., thought that cl. (1)(a) read with the Explanation permitted such State to tax the sale and that this was a special provision as compared to cl. (2) which was a general provision relating to the same matter and that therefore it would prevail over cl. (2).

On both these points the majority in *Bengal Immunity Co.* v. *State of Bihar*[71] expressed its dissent and Bhagwati J., also held that his previous view on these two points was erroneous. So under the ruling of the majority (including Bhagwati J.) in the *Bengal Immunity Co.'s case*[72] (i) the effect of the Explanation to cl. (1)(a) is not to make the sales and purchases coming under the Explanation taxable *both* by the 'title' State and the 'delivery' State (as had been held previously by Bhagwati J., in the *United Motors case*[73]) but (if at all) only by the 'delivery' State, and (ii) the rule of *generalia specialibus non derogant* does not apply so as to exclude the applicability of cl. (2) to sales and purchases falling within the Explanation to cl. (1) (a).

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[69] 1955 S C 661 (682) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC).

[70] 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

[71] 1955 S C 661 [AIR V 42 C 101] : (1955) 2 S C R 603 (SC).

[72] 1955 S C 661 (687) (Pr 48) [A I R V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

[73] 1953 S C 252 (271) (Pr 76) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State cf Bombay* v. *United Motors (India) Ltd.*

S. R. Das J., was not a member of the Bench in *State of Bombay* v. *United Motors India Ltd.*[74] But while delivering his dissenting judgment in *State of Travancore-Cochin* v. *Shanmugha Vilas Cashew-nut Factory*[75] he expressed his strong dissent from the majority view in *State of Bombay* v. *United Motors India Ltd.*[76] His reasoning was the same as in his leading judgment in the *Bengal Immunity Co.* v. *State of Bihar*,[77] which overruled the view in *State of Bombay* v. *United Motors India Ltd.*,[78] which has already been noted in the appropriate contexts in the foregoing parts of this Note.

(1) Recapitulation: Scope of cl. (1) (a), Explanation and cl. (2).

Unless and until Parliament by law otherwise provides, no State will be entitled to impose taxes on sales and purchases which take place in the course of inter-State trade or commerce, whether or not such sales fall within the scope of Explanation to cl. (1) (a). The decision to the contrary in *State of Bombay* v. *United Motors India Ltd.*[79], namely, that a sale involving inter-State elements may be taxed by the State in which the goods are actually delivered for consumption, is no longer good law[80] and the above decision of the Supreme Court has been overruled by it in its subsequent ruling in the *Bengal Immunity Co.* v. *State of Bihar*.[81]

The main points of the difference of views have centred round the interpretation of cl. (1) (a) read with the Explanation, and cl. (2). The two main questions in this connection have been : (i) whether cl. (1) (a) read with the Explanation confers on the 'delivery' State the power to tax an inter-State sale, and (ii) whether this power is not affected by cl. (2), which puts a ban on State taxation of sales and purchases taking place in the course of inter-State trade and commerce.

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[74] 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (SC).

[75] 1953 S C 333 (343) (Pr 39) : [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC).

[76] 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (SC).

[77] 1955 S C 661 (687) (Pr 48) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC).

[78] 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (SC).

[79] 1953 S C 252 (258) [AIR V 40 C 62] : 1953 S C R 1069 (SC).

[80] In order to validate levy of tax on sales and purchases in course of inter-State trade and commerce that took place prior to the decision of the Supreme Court in the *Bengal Immunity Co.'s case*, (AIR 1955 S C 661 (SC)), the President has promulgated the Sales Tax Validation Ordinance, 1956 (30th January 1956). For text of the Ordinance, see Note 15.

[81] 1955 S C 661 (687) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC).

(i) Scope of cl. (1) (a), Explanation: Whether it authorises taxation of sales coming under it.

As regards the scope of cl. (1) (a) read with the Explanation, the main views on the question may be formulated as follows:

(i) The Explanation does no more than define what an outside sale is and the purpose of the Explanation is exhausted as soon as it is held that an inter-State sale cannot be taxed by any State other than the delivery State. The Explanation cannot be relied on for the purpose of attributing any legislative power to the State Legislature of the delivery State to tax an inter-State sale. This is the majority view in the *Bengal Immunity Co.'s case.*[82]

(ii) The Explanation cl. (1) (a) has not the effect of conferring legislative power on the delivery State to tax inter-State sales, and the delivery State is only *left free* to tax such sales. But the Explanation has the effect of imparting to the sale a statutory *situs* in the delivery State.

This is the majority view in the *United Motors case.*[83] On this view the majority held that the sales covered by Explanation to cl. (1) (a) became purely intra-State sales and hence removed from the operation of cl. (2).

(iii) The Explanation has the effect of making the sale taxable both by the "delivery" State and the 'title' State (that is, the State in which property in the goods passes). This was the view taken by Bhagwati J. in the *United Motors case*[84] but was recanted by him in *Bengal Immunity Co.'s case.*[85]

(iv) The Explanation to cl. (1) (a) has a positive aspect and authorises the imposition of tax by the delivery State. This was the view taken by the minority Judges (Jagannadhadas and Venkatarama Ayyar JJ.) in the *Bengal Immunity Co.'s case.*[86] Sinha, J., also agreed with the reasoning of Venkatarama Ayyar, J.

As already stated, the majority view in the *Bengal Immunity Co's case*[87] was against construing the Explanation to cl. (1) (a) as positively conferring any legislative power of taxation on the delivery State. It recognized the difficulty created by the form of the Explanation which defined an outside sale not in a simple and straightforward manner as it could have done, but in a circuitous manner by defining an inside sale. But the majority was not inclined to attach too much importance to this factor and regarded it only as an instance of inept drafting, which should not make a difference to the true and proper construction of the provision. S. R. Das, Ag. C. J., observed at p. 678 of A. I. R. 1955 S. C.:

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[82] 1955 S C 661 (677, 678) (Pr 26) : [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co. v. State of Bihar.*

[83] 1953 S C 252 (257) (Pr 12) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay v. United Motors (India) Ltd.*

[84] 1953 S C 252 (271) (Pr 76) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay v. United Motors (India) Ltd.*

[85] 1955 S C 661 (711) (Pr 113) [A I R V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co. v. State of Bihar.*

[86] 1955 S C 661 (Para 133 Jagannadhadas J.; Para 153, Venkatarama Ayyar J.) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co. v. State of Bihar.*

[87] 1955 S C 661 [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co. v. State of Bihar.*

> "To hold that the Explanation has, besides its declared purpose, another hidden purpose of conferring or enlarging legislative power is to build up a fanciful argument merely on the infelicitous and involved language used in the Explanation, although it is distinctly not the purpose of the Explanation and although it does not purport substantively and *proprio vigore* to confer any legislative power on any State."

He also observed at p. 678 of A. I. R. 1955 S. C.:

> "It is utterly illogical and untenable to say that ART. 286 which was introduced in the Constitution to place restrictions on the legislative powers of the States, by a side wind, as it were, gave enlarged legislative powers to the State of delivery by an Explanation sandwiched between two restrictions."

In the view of the majority in the *Bengal Immunity Co.'s case*[88] therefore, no question arose as to cl. (2) taking away a power which was conferred by cl. (1) (a), Explanation while in the view of the minority Judges in the same case, the Explanation to cl. (1) (a) conferred no authority to tax and on the principle of harmonious construction cl. (2) of the article was to be given a construction which would save intact the authority to tax conferred by cl. (1) (a), Explanation.

But the majority Judges did not find it necessary to express a final opinion on the scope of cl. (1) (a) Explanation, because, in the view which they took of the article, each of the several restrictions imposed by the article had an independent and cumulative operation, so that even on the assumption that cl. (1) (a) Explanation authorised the taxation of inter-State sales in the cases covered by the Explanation, the operation of cl. (2) would not be affected and the prohibition imposed thereby would come into play to prevent the taxation. So also, with reference to the majority view in the *United Motors case*[89] that the Explanation to cl. (1) (a) imparted a statutory

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[88] **1955 S C 661 [AIR V 42 C 101] : (1955) 2 S C R 603 (SC),** *Bengal Immunity Co.* v. *State of Bihar.*

[89] **1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (SC),** *State of Bombay* v. *United Motors (India) Ltd.*

situs to the inter-State sale wholly in the delivery State, although the majority in the *Bengal Immunity Co.'s case*[90] did not assent to this view, yet they did not find it necessary to express its final opinion on the question, inasmuch as in its view the *situs* of the sale was irrelevant to the question whether the sale took place in the course of inter-State trade and commerce or not, and if the sale took place in the course of inter-State trade and commerce, then by the principle already mentioned, namely, that the restrictions imposed by the article are mutually independent and operative cumulatively, the operation of cl. (2) would not in any way be whittled down by Explanation to cl. (1) (a) and therefore, even on the assumption that the delivery State was left free to tax the inter-State sales coming within the scope of the Explanation, this power of taxation by the delivery State would not escape the restrictions imposed by other clauses including cl. (2).

(ii) Scope of clause (2): Whether it precludes State taxation of sales covered by Explanation.

On this question also, a number of views have been expressed and they can be formulated as follows :

(i) Clause (2) applies to *all* sales and purchases which take place in the course of inter-State trade and commerce, whether they are covered by the Explanation to cl. (1) (a) or not. This is the view of the majority in the *Bengal Immunity Co.'s case*[91] which overrules the decision in the *United Motors case*.[92] Under this view, until and unless Parliament provides otherwise by law, sales and purchases in the course of inter-State trade and commerce cannot be subjected to taxation, notwithstanding that they may be covered by the Explanation to cl. (1) (a).

(ii) Sales coming within Explanation to cl. (1) (a) can be taxed by the delivery State and this power of taxation is not affected by cl. (2). This was the view of the majority of the Judges in the *United Motors case*.[93] The view proceeded on the basis that the Explanation to cl. (1) (a) had the effect of making the sales covered thereby purely intra-State sales, taking place in the delivery State at the end of the transportation of the goods to such State, and hence, according to the majority view in the *United Motors case*[94] such sales must

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90. 1955 S C 661 [AIR V 42 C 101]: (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

91. 1955 S C 661 (682) (Pr 33) [AIR V 42 C 101] : (1955) 2 S C R 603 (S C), *Bengal Immunity Co.* v. *State of Bihar.*

92. 1953 S C 252 (258) [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.*

93. 1953 S C 252 (258, 259) (Prs. 16, 17) [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.*

94. 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.*

be held not to take place *in the course of* inter-State trade and commerce. Thus, it will be seen that the majority view in the *United Motors case*[95] does not proceed on the basis that cl. (1) (a) Explanation operates as an exception to cl. (2) or cuts down the operation of cl. (2). The view proceeds on the basis that the sales covered by the Explanation to cl. (1) (a) are not covered by clause (2) at all, so that there is no question of the one operating as an exception to the other.

It is important to note this feature about the majority view in the *United Motors case*[96] because although the three learned Judges in the later case (namely, the *Bengal Immunity Co.'s case*[97]) which overruled the majority view in the *United Motors case*[98] who constituted a minority in the *Bengal Immunity Co.'s case*[99] concurred in the view of the majority in the *United Motors case*[100] on the main question and were of the opinion that the delivery State had the power of taxing the inter-State sales covered by the Explanation to cl. (1) (a), they, not only adopted the reasoning of the majority in the *United Motors case*[101] but also proceeded on the theory of harmonious construction of statutes and adopted the view that cl. (1) (a) Explanation and cl. (2) must be construed in such a way that effect can be given to both and that, therefore, cl. (1) (a) Explanation would *pro tanto* operate as an exception to cl. (2).

(iii) In construing cl. (1) (a) Explanation and cl. (2), the principle of harmonious construction must be adopted. As cl. (1) (a) Explanation authorises the imposition of tax by the delivery State on a certain class of inter-State sales, cl. (2) must be construed in such a way as not to take away this power but as only applying to inter-State sales not covered by cl. (1) (a) Explanation. This was the view of the minority in the *Bengal Immunity Co.'s case.*[102] The difference between this view and the views of the majority Judges in

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95. 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.*

96. 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.*

97. 1955 S C 661 [AIR V 42 C 101]: (1955) 2 S C R 603 (S C), *Bengal Immunity Co.* v. *State of Bihar.*

98. 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.*

99. 1955 S C 661 [AIR V 42 C 101]: (1955) 2 S C R 603 (S C), *Bengal Immunity Co.* v. *State of Bihar.*

100. 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.*

101. 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.*

102. 1955 S C 661 [AIR V 42 C 101] : (1955) 2 S C R 603 (S C), *Bengal Immunity Co.* v. *State of Bihar.*

the same case and of the majority Judges in the *United Motors case*[103] has already been discussed above. But it may be repeated that the majority in the *Bengal Immunity Co.'s case*[104] proceeded on the view that several restrictions imposed by this article on the State's power of taxation have a mutually independent operation and have therefore to be applied cumulatively, so that the mere fact that taxation of a certain class of inter-State sales is permissible under cl. (1) (a) Explanation does not mean that the prohibition under cl. (2) will not apply to such taxation.

(iv) The class of sales covered by cl. (1) (a) Explanation constitutes a special class of inter-State sales, and cl. (1) (a) Explanation is a special provision with regard to such sales, while cl. (2) is a general provision with regard to inter-State sales and purchases. Hence, the principle *generalia specialibus non derogant* must be applied to such cases and it must be held that cl. (2) does not apply to the special class of inter-State sales covered by cl. (1) (a) Explanation. Hence, in such cases, the power of taxation which the delivery State may have by virtue of cl. (1) (a) Explanation, is not affected by cl. (2). This was the view of Bhagwati J. in the *United Motors case*.[105] But when he sat on the Bench of the Supreme Court in the *Bengal Immunity Co.'s case*[106] which overruled the decision in the *United Motors case*,[107] he recanted his earlier view and held it to be erroneous. The other learned Judges, who constituted the majority in the *Bengal Immunity Co.'s case*,[108] were also of the opinion that cl. (1) (a) Explanation and cl. (2) apply to two wholly different classes of cases, that is, cases viewed from two wholly different points of view and the principle of *generalia specialibus non derogant* does not apply to such cases.

(m) Non-delivery State cannot tax.

States other than the "delivery" State have no power to tax inter-State sales,[109] because, in regard to such States, the sale would be an 'outside' sale, the taxation of which is prohibited by cl. (1) (a).

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[103] 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.*

[104] 1955 S C 661 (676, 677) (Pr. 21) [AIR V 42 C 101]: (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

[105] 1953 S C 252 (271) (Pr. 76) [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.*

[106] 1955 S C 661 (707) (Pr. 99) [AIR V 42 C 101] : (1955) 2 S C R 603 (S C), *Bengal Immunity Co.* v. *State of Bihar.*

[107] 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.*

[108] 1955 S C 661 (685) (Pr. 42) [AIR V 42 C 101] : (1955) 2 S C R 603 (S C), *Bengal Immunity Co.* v. *State of Bihar.*

[109] 1955 S C 765 (773) (Pr. 26) [(S) AIR V 42 C 106] : (1955) 2 S C R 483 (S C), *Ram Narain Sons Ltd.* v. *Asst. Sales Tax Commissioner.* (Goods manufactured in M. P. delivered for consumption in U. P. — State of M. P. cannot recover sales tax.)

(n) Non-resident dealers, taxation of.

The prohibition imposed by cl. (2) of this article against taxation of sales and purchases in course of inter-State trade and commerce, is not an absolute but a qualified one, and is subject to the opening words of the clause "except in so far as Parliament may by law otherwise provide." If and when Parliament by law removes the ban, States will have the power to impose taxes on inter-State sales. But even in that contingency, the power of the States to impose taxes on such sales will be subject to the restriction under cl. (1) (a) read with the Explanation. In other words, even if the Parliament should lift the ban under cl. (2), it is only the 'delivery' State under cl. (1) (a) Explanation that would have the power to tax inter-State sales and purchases and not other States.

The question arises whether the power of the 'delivery' State to impose taxes on inter-State sales will be limited to the taxation of the *buyers* within its territory or whether it extends to the taxation of non-resident dealers who have sent the goods from other States. In *State of Bombay* v. *United Motors India Ltd.*,[110] in which it was held that the power of the 'delivery' State to tax inter-State sales was not affected by cl. (2), a view since overruled in the *Bengal Immunity Co.'s Case*,[111] this question did not specifically arise for decision, as the assessees, who contested the validity of the Bombay Sales-tax Act, 1952, belonged to the Bombay State itself and were carrying on business in Bombay. But the observations found in different parts of the majority judgment indicate that, in the view of the

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1953 S C 252 (258) (Pr. 13) [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.* (The *non obstante* clause in the Explanation does not mean that under the general law, the place where the title passes is the place where the sale takes place.)

1955 All 99 (102) (Pr. 5) [(S) AIR V 42 C 35], *Kanpur Oil Mills* v. *Judge (Appeals) Sales Tax, Kanpur.* (Sale in U. P. — Property in goods passing in U. P.—But goods delivered in other States for consumption there—U. P. **cannot tax.)**

1955 Orissa 172 (175) (Pr. 12) [(S) AIR V 42 C 47] : I L R (1955) Cut 267 (D B), *B. C. Patel* v. *Sales Tax Officer.* (Sale from Orissa to buyer outside Orissa —Goods delivered outside Orissa for consumption outside Orissa—Orissa cannot tax.)

[But see 1953 Mad 116 (128) (Pr. 31) [AIR V 40 C 36] (DB), *Govindarajulu Naidu & Co.* v. *State of Madras.* (The view expressed in this case that the State in which the *contract is concluded* can tax an inter-State sale cannot be considered good law now after the decision of the Supreme Court in A I R 1953 S C 252 (SC).]

Note. — *Bhagwati J.* held in the *United Motors' case* (AIR 1953 S C 252 (S C) that both the 'delivery' State and the State in which the property in the goods has passed may tax such sales. But he retracted this view in the *Bengal Immunity Co.'s case* (A I R 1955 S C 661 (S C).)

[110] 1953 S C 252 (260) (Pr. 22) [AIR V 40 C 62] : 1953 S C R 1069 (S C).

[111] 1955 S C 661 (687) (Pr. 48) [AIR V 42 C 101] : (1955) 2 S C R 603 (S C), ***Bengal Immunity Co.* v. *State of Bihar.***

majority, the residence of the assessee within the State is not an essential condition for the taxation of the sale or purchase by the State where such taxation is otherwise competent. Thus, on page 256 of A. I. R. 1953 Supreme Court, in referring to the decision of the Privy Council in *Wallace Brothers & Co.* v. *Commissioner of Income-tax, Bombay*[112] which laid down the principle of sufficient territorial *nexus* as the basis of taxation, the majority judgment of the Supreme Court specially points out that the assessee, who was held liable to be assessed to income-tax in that case, was a *non-resident* foreign company.

On page 260 of the same report in paragraph 22 of the judgment, the following passage occurs:

> "The view which we have expressed above avoids either anomaly and would place local trade and inter-State trade on an equal footing. The delivery State would tax both local and out-of-State dealers equally without discrimination against either and that, we think, is the only measure of protection which ART. 286 could reasonably be supposed to accord to inter-State sales or purchases, when it is construed in the light of ARTS. 301 and 304."

The above passage clearly contemplates that the delivery State can tax an out-of-State dealer.

But on page 258, in paragraph 15, the following passage occurs:

> "Thus, all buyers within the State of delivery from out-of-State sellers, except those buying for re-export out of the State, would be within the scope of the Explanation and liable to be taxed by the State on their inter-State transactions."

This passage, no doubt, is somewhat inconsistent with the above passages with the result that a little confusion is caused as to the real view taken. This matter has been commented on by S. R. Das, J., also in his leading judgment in the *Bengal Immunity Co.'s case.*[113] But in view of the explicit language of the passage on p. 260 above quoted, it seems that the passage on p. 258 subsequently quoted, must be taken only to indicate that the delivery State has power to tax the buyers within its territory as well as the sellers outside its territory. The passage, when taken along with the other passages already quoted, cannot mean that the delivery State can only tax the buyers within its territory and not the sellers out of its territory.

It is in this sense that the judgment of the majority has also been understood by S. R. Das, J., in *State of Travancore-Cochin* v.

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112. 1948 P C 118 (121) [AIR V 35 C 34] : 75 Ind App 86 : 1948 F C R 1 (P C).
113. 1955 S C 661 (673) (Pr. 18) [AIR V 42 C 101] : (1955) 2 S C R 603 (S C), *Bengal Immunity Co.* v. *State of Bihar.*

Shanmugha Vilas Cashew-nut Factory.[114] It has already been mentioned above that S. R. Das, J., dissented from the majority view in the *United Motors case.*[115] In criticising the view of the majority, S. R. Das, J., points out the anomalous and highly embarrassing results that would follow from holding that the delivery State can tax sellers in other States. At page 345 of the report (A. I. R. 1953 Supreme Court), he observes as follows in this connection :

> "To accede to this argument will mean that the Sales-tax Officer of the delivery State will have jurisdiction to call upon dealers outside that State to submit returns of their turnover in respect of goods delivered by them to dealers in that State under transactions of sale made by them with dealers within that State. Thus, a dealer in, say, Pepsu who delivers goods to a dealer in, say, Travancore-Cochin will become subject to the jurisdiction of the last mentioned State and will have to file returns of their turnover and support the same by producing their books of account there. I cannot imagine that our Constitution-makers intended to produce this anomalous result."

He has again adverted to this aspect in his leading judgment in the *Bengal Immunity Co.'s case*[116] and has proceeded on the basis that the power of the "delivery" State, if and when conceded, would extend to taxing both the seller as well as purchaser. The dissenting Judges in the same case, Jagannadhadas and Venkatarama Ayyar, JJ., also have adopted the view that the taxing power of the 'delivery' State under cl. (1) (a) Explanation would extend to taxation of both buyers in the State and sellers outside.

The view that the power of the delivery State to tax an inter-State sale extends to the taxation of a non-resident seller belonging to another State, was specifically held by Patna High Court in *Bengal Immunity Co.* v. *State of Bihar.*[117] In that case, the Bengal Immunity Co. of Calcutta sold goods to purchasers in Bihar. The goods were delivered in Bihar to the purchasers there for consumption in the State of Bihar. It was held by the Patna High Court that the Bihar Government could levy sales-tax on the Bengal Immunity Company from Calcutta in respect of its sales to purchasers in Bihar.

The same view has also been taken by the Assam High Court in *Cement Marketing Co. of India Ltd.* v. *State of Assam.*[118] In that case, it was held that a seller in Bombay selling goods to purchasers in Assam to whom the goods were delivered in Assam for the purpose of consumption in that State, could be taxed by Assam under the Assam Sales-tax Act, 1947.

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[114] **114.** 1953 S C 333 (345) (Pr. 42) [AIR V 40 C 78) : 1954 S C R 53 : I L R (1954) Trav Co 1 (S C).

[115] **115.** 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.*

[116] **116.** 1955 S C 661 [AIR V 42 C 101] : (1955) 2 S C R 603 (S C), *Bengal Immunity Co.* v. *State of Bihar.*

[117] **117.** 1953 Pat 87 (92) (Pr 14) [AIR V 40 C 26] : I L R 32 Pat 19 (DB).

[118] **118.** 1955 Assam 113 (115) (Pr. 5) [AIR V 42 C 26] (D B).

In *Bengal Immunity Co.* v. *State of Bihar*,[119] Jagannadhadas and Venkatarama Ayyar, JJ., also expressed the view that if a State could tax a sale or purchase involving inter-State elements, the tax could be imposed on a non-resident seller. Venkatarama Ayyar, J., observed as follows[120]:

> "When ART. 286 (1) (a) and the Explanation refer to a sale or purchase, they merely conform to the terms of Entry 54, and these words cannot therefore be construed as splitting up the power to tax sales into two parts, one available against the purchaser at all times, as in the very nature of it he must be within the State, and the other against a seller if he is within jurisdiction. The power is one and indivisible to be exercised when the conditions mentioned in the Explanation are satisfied against either a seller or buyer as the Legislature might determine.
>
> "The language of the Explanation, it should be marked, does not impose any limitation or condition on the exercise of this power. It is general and unqualified, and will comprehend all cases in which goods are delivered for consumption in the taxing State irrespective of whether the seller is within the State or not. To hold that the tax could be imposed on a seller only if he is within the State would be to add words to the Explanation which are not there, and for this, there is no justification. On the other hand, there are good reasons why the power should have been vested in the Legislature to determine whether it will tax the seller or the buyer. The tax imposed under the Explanation really falls on the consumer-purchaser.
>
> "While it is possible that with reference to certain classes of goods the tax can effectively be imposed on the purchaser, it must happen that with reference to other kinds of goods as, for example,

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[119] 1955 S C 661 (723, 749) [AIR V 42 C 101] : (1955) 2 S C R 603 (S C). (*Jagannadhadas J.*—Assessment of non-resident is perfectly valid. Requisition may be served by post and in absence of compliance, best judgment assessment can be made: *Whitney* v. *Commissioners of Inland Revenue*, (1926) 1926 App Cas 37, Foll. (P. 723, Pr. 139).

Venkatarama Ayyar J.—On a construction of Arts. 245 (1) and 246, it will be difficult to come to any other conclusion than that a sales-tax legislation of a State which is otherwise valid, is not *ultra vires* on the ground that the person proposed to be taxed is not resident within the territorial limits of the State. (P. 749) (Pr. 197).)

[120] 1955 S C 661 (Prs. 205, 206) [AIR V 42 C 101] : (1955) 2 S C R 603 (S C), *Bengal Immunity Co.* v. *State of Bihar*.

medicines in the present appeal, it cannot be so done, and, as already pointed out, it is a 'familiar and sanctioned device' to make the seller the agent of the State for collection of taxes. In leaving it to the States to determine whether they will tax the seller or the buyer, the Explanation has merely given recognition to a familiar principle of taxation laws sanctioned by usage and upheld by authority."

In *Govindarajulu Naidu and Co.* v. *State of Madras*,[121] the Madras High Court, after exhaustive discussion of the scope of cl. (1) (a), the Explanation to that clause and cl. (2) summed up its conclusions as follows:

> "The result may be thus summed up:
>
> 1. The State has plenary powers of taxation over inter-State sales.
> 2. The State has no power to impose a tax on extra-State sales.
> 3. In respect of inter-State sales, the State in which the contract is concluded is the only State which has the power to impose a tax.
> 4. Where goods are delivered for consumption in a particular State, that State has the power to impose a use tax or a purchase tax thereon notwithstanding that the transaction of sale is extra-State."

It is clear that propositions 3 and 4 in the above summing up are now no longer good law after the decision of the Supreme Court in the *Bengal Immunity Co.'s case*,[122] according to which, unless and until Parliament by law provides otherwise, States cannot tax inter-State sales whether they fall under cl. (1) (a) Explanation or not.

As regards proposition 4, if it means that only the *purchaser* in the delivery State can be taxed by such State and not the *seller* in another State, (if and when such State gets the power to tax inter-State sales and purchases) the proposition does not seem to be correct in view of the authorities already cited.

(o) Limitations arising under Sales-tax Acts themselves.

The decisions of the Supreme Court in the *United Motors case*[123] and the *Bengal Immunity Co.'s case*,[124] only deal with the limitations imposed by the *Constitution* on the power of a State to impose taxes and on sales and purchases of goods. But apart from the Constitution, the question may arise as to the circumstances under which a sale having elements of an inter-State character will be taxable under a particular Sales-tax law.[125]

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[121] 1953 Mad 116 (128) (Pr. 31) [AIR V 40 C 36] (D B).

[122] 1955 S C 661 (687) (Pr. 48) [AIR V 42 C 101] : (1955) 2 S C R 603 (S C) *Bengal Immunity Co.* v. *State of Bihar.*

[123] 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.*

[124] 1955 S C 661 [AIR V 42 C 101] : (1955) 2 S C R 603 (S C), *Bengal Immunity Co.* v. *State of Bihar.*

(p) Place where title passes — Question as to — Importance of

For instance, the Sales-tax Act of a particular State may authorise the imposition of a tax on sale only in cases in which the property in the goods passes in the State. In such a case, the State will not be entitled to tax a sale under which the property in the goods passes outside the State, although the goods may be delivered within the State for the purpose of consumption therein. Thus, in *Poppatlal Shah* v. *State of Madras*,[126] it has been held by the Supreme Court that under the Madras General Sales Tax Act, 1939, sales-tax can be levied only in respect of sales under which the property in the goods passed in the Madras State. Although this decision related to the liability for tax for a period before the coming into force of the Constitution the principle of this decision will hold good even subsequent to the Constitution if and when Parliament by law removes the ban under cl. (2) on the taxation of inter-State sales and purchases. Hence, where A in Bombay sells goods to B in Madras and the property in the goods passes to B in Bombay the Madras State will not have power to tax the sale under the Madras General Sales Tax Act, 1939, even if the goods are delivered in Madras as a direct result of the sale, for purposes of consumption in Madras, and even after Parliament removes the ban under cl. (2). This point must be treated as settled by the decision of the Supreme Court in *Poppatlal Shah's case*[127] and as not being in any way affected by the decisions in the *United Motors' case*[128] or the *Bengal Immunity Co.'s case*.[129]

Whenever the provisions of the Sales-tax Act are identical in material particulars with those of the Madras General Sales Tax Act, 1939, so that the ruling of the Supreme Court in *Poppatlal Shah's case*[130] may be applied to the case, the sale would be immune from tax if the property in the goods has passed in another State although the goods may have been delivered under the sale in the taxing State for the purpose of consumption in that State, and although Parliament may have lifted the ban under cl. (2).

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[125] **125.** 1955 Orissa 122 (124) [(S) AIR V 42 C 35] : I L R (1955) Cut 334 (DB), *Madras Auto Service* v. *Asst. Collector, Com. Taxes.* (Goods sold by A in Madras to purchasers in Orissa and delivered there for purposes of consumption therein—Though this may give jurisdiction to Orissa to tax the sales, under the Supreme Court ruling in *United Motors' Case*, yet it has to be seen whether within the four corners of the Orissa Sales Tax Act, A is made liable to be taxed by Orissa State.)

[126] **126.** 1953 S C 274 (277) (Pr 9) [AIR V 40 C 63] : 1953 Cri L Jour 1105 : 1953 S C R 677 (SC).

[127] **127.** 1953 S C 274 [AIR V 40 C 63] : 1953 Cri L Jour 1105 : 1953 S C R 677 (SC), *Poppatlal Shah* v. *State of Madras.*

[128] **128.** 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

[129] **129.** 1955 S C 661 [AIR V 42 C 101] : (1955) 2 S C R 603 (S C), *Bengal Immunity Co.* v. *State of Bihar.*

[130] **130.** 1953 S C 274 [AIR V 40 C 63] : 1953 Cri L Jour 1105 : 1953 S C R 677 (SC), *Poppatlal Shah* v. *State of Madras.*

In this connection, it must be noted that in the Sales-tax Acts of several States (e. g., Assam, Bengal, Bihar, Bombay, etc.) the definition of 'sale' incorporates a provision similar to the Explanation to cl. (1) (a) of this article. In such cases, the ruling in *Poppatlal Shah's case*[131] will not apply and the sale will be deemed to take place in the 'delivery' State notwithstanding the fact that the property in the goods may have passed in some other State. But such a provision is not contained in the Sales-tax Acts of Madras, Andhra, Punjab, Mysore, Orissa, Pepsu, Travancore-Cochin and Vindhya Pradesh.

With regard to the illustration given above, it has been stated that the Madras State will not have the power to tax the sale under the Madras General Sales Tax Act, 1939, as construed by the Supreme Court in *Poppatlal Shah's case.*[132] It must be noted that in such a case, the Bombay State also would not have the power to tax the sale, because as regards the Bombay State, the sale would be an "outside" sale under the Explanation to cl. (1) (a) as interpreted by the Supreme Court in the *United Motors case*[133] (on this point, the case has not been reversed by the Supreme Court in the *Bengal Immunity Co's case*[134]) although the property in the goods may pass in Bombay.

(q) Reasoning in *Poppatlal Shah* v. *State of Madras*: Mode of construing Sales-Tax Act.

It will be useful to draw attention to the reasoning of the Supreme Court in *Poppatlal Shah's case*[135] in regard to its view that under the Madras General Sales Tax Act, 1939, a sale could be taxed only in cases in which the title to the goods passed in the Madras State.

In that case, the course of business, which was followed by the assessee, a firm carrying on business in Madras, was as follows : The assessee company received orders in its Madras office from Calcutta merchants for supply of various articles. These articles were purchased in the local markets and despatched to Calcutta by rail or steamer. The railway receipts and bills of lading were taken in the name of the vendor company and so also were the insurance policies and they were sent to the company's bankers in Calcutta who delivered the same to the consignees on payment of prices and other charges. It was admitted that under the circumstances the property in the goods sold passed in Calcutta to the purchasers. The question that arose for decision was whether the Madras company was liable to be taxed in Madras under the Madras General Sales Tax Act, 1939, in respect of the sales. Two contentions were raised on behalf of the Madras company: (i) that the Madras Provincial Legislature under the Government of India Act, 1935, had no power to make a law which would enable the Madras Government to impose a tax on a sale under which the title to the goods passed in another Province. (ii) Even if the Provincial Legislature is assumed to have had the power to make such a law, the Madras General Sales Tax Act, 1939, did not empower the Madras Government to tax a sale under which the title to the property passed outside the Province.

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[131] 1953 S C 274 [AIR V 40 C 63] : 1953 Cri L Jour 1105 : 1953 S C R 677 (SC), *Poppatlal Shah* v. *State of Madras.*

[132] 1953 S C 274 (277) (Pr 9) [AIR V 40 C 63] : 1953 Cri L Jour 1105 : 1953 S C R 677 (SC), *Poppatlal Shah* v. *State of Madras.*

[133] 1953 S C 252 (257) (Pr 12) [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.*

[134] 1955 S C 661 (677) (Pr 24) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

[135] 1953 S C 274 (276, 277) (Prs 6, 9) [AIR V 40 C 63] : 1953 Cri L Jour 1105 : 1953 S C R 677 (S C), *Poppatlal Shah* v. *State of Madras.*

The Supreme Court rejected the first contention and held that provided there was a sufficient territorial *nexus* between a Province and the transaction of sale sought to be taxed, the Provincial Legislature *could* validly make a law for the imposition of a tax on the transaction even though the title to the goods thereunder may have passed in another Province. But the Supreme Court accepted the second contention and held that under the Madras Act the Madras Government had no power to impose a tax on a sale under which the property in goods passed in another Province.

Although the decision of the Supreme Court on the second point proceeded on the interpretation of the particular Sales-tax Act, the salient features of the reasoning of the Supreme Court on this point are worth noting as being of great significance for the decision of similar questions that may arise with regard to the interpretation of the sales-tax laws of other Provinces or States. The Supreme Court observed that the question was as to what exactly has been adopted as the basis of the levy of sales-tax by the Legislature. In answering this question, the Supreme Court took into consideration the title and the preamble of the Act for the purpose of ascertaining the legislative intent. After pointing out that the object of the Act was to impose taxes on sales that take place within the Province, the Supreme Court examines what is the meaning attached to the expression 'sale of goods' by the Act. Then after referring to the definition of 'sale' in the Act, the Supreme Court holds that the element of transfer of property is the decisive factor in a 'sale' as contemplated by the Act and that it is only in cases in which the property in the goods passes in the Madras State that the sale will be taxable under the Act. The Supreme Court observed at p. 276 of A. I. R. 1953 S. C. as follows :

> "It is a settled rule of construction that to ascertain the legislative intent, all the constituent parts of a statute are to be taken together and each word, phrase or sentence is to be considered in the light of the general purpose and object of the Act itself. The title of the Madras Sales Tax Act describes it to be an Act, the object of which is to provide for the levy of a general tax on the sale of goods in the Province of Madras and the very same words are repeated in the Preamble which follows. The title and preamble, whatever their value might be as aids to the construction of a statute, undoubtedly throw light on the intent and design of the Legislature and indicate the scope and purpose of the legislation itself. The title and preamble of the Madras Sales Tax Act clearly show that its object is to impose taxes on sales that take place within the Province, though these words do not necessarily mean that the property in the goods sold must pass within the Province. The expression 'sale of goods' is a composite expression consisting of various ingredients or elements. Thus, there are the elements of a bargain or contract of sale, the payment or promise of payment of price, the delivery of goods and the actual passing of title, and each one of them is essential to a transaction of sale though the sale is not completed or concluded unless the purchaser becomes the owner of the property. The question is what element or elements have been accepted by the Madras Legislature as constituting a sale in the Province upon which it is the object of the statute to levy tax. Section 2 (h) gives the definition of 'sale' and it is defined as meaning,
>
> 'every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge.'
>
> Unmistakably the stress is laid in this definition on the element of transfer of property in a sale and no other. The language gives no indication of the popular meaning of sale in which, according to the High Court, the word was used."

It will be seen from the above that the charging section in the Madras Sales Tax Act has not been referred to by the Supreme Court. The charging section in the Madras Act does not contain any element of territorial limitation. Notwithstanding this, the Supreme Court has taken into consideration the title and the preamble of the Act and on their basis has held that only a sale which takes place within the Province of Madras can be taxed under the Act and on the same basis has further held that for the purpose of the Act 'sale' refers to the transfer of title to the goods as an essential element.

(r) Place where contract is entered into is immaterial.

It may be noted in this connection that in the same case the Madras High Court had also held that the sale could be taxed under the Madras Act only in cases in which the sale took place in the Madras State. But the Madras High Court had held that the expression "sale" under the Act did not refer to the passing of the title to the goods but to the bargain or the contract between the parties. The Madras High Court took the view that the expression "sale" had both the popular and legal sense and that in the Madras Act the expression must be understood as being used in the popular sense as signifying the transaction itself which results in the passing of the property in the goods and not in the legal sense as referring to the actual passing of the property in the goods. It may be noted that this view was taken by the Madras High Court in *Govindarajulu Naidu & Co.* v. *State of Madras.*[136] But this view was overruled by the Supreme Court in *Poppatlal Shah's case.*[137]

(s) Place where title passes, materiality of.

It will thus be seen that though Parliament may remove the ban under cl. (2), it does not necessarily follow that a State will have the power to impose a tax on an out-of-State sale in every case in which the goods are delivered within its borders for the purpose of consumption therein. The question will have to be decided in each case on the terms of the particular sales-tax legislation. In interpreting such sales-tax legislation the reasoning of the Supreme Court in *Poppatlal Shah's case*[138] may be relied on as a guidance and where the material provisions are similar to those interpreted by the Supreme Court, it may be held that in the case of out-of-State sales in which the property in goods passes in another State, it will not be competent to a State (notwithstanding cl. (1) (a) Explanation) to tax the sale even though the goods are delivered within its borders for the purpose of consumption in such State.

(ss) Situs of sale.

It has been seen above (sub-note (b)) that neither the legislative entries conferring the power of imposing sales-tax nor the provisions of ART. 245 or ART. 246 require that the sale or purchase to be taxed must take place within the taxing State. But such a condition may be laid down by the taxing statute itself. In such a case, it will have to be considered what is the *situs* of a sale. But a sale of goods involves several ingredients, such as the contract of sale, the transfer of title, payment of price, delivery of goods, etc., and in view of this, it is difficult to assign a sale to a particular State where the ingredients involved take place in different States. In *Bengal Immunity Co.* v. *State of Bihar*,[139] Das, Ag. C. J., observed as follows :

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[136] 1953 Mad 116 (128) [AIR V 40 C 36] (DB).

[137] 1953 S C 274 (276, 277) (Prs 8, 9) [AIR V 40 C 63] : 1953 Cri L Jour 1105 : 1953 S C R 677 (S C), *Poppatlal Shah* v. *State of Madras.*

[138] 1953 S C 274 [AIR V 40 C 63] : 1953 Cri L Jour 1105 : 1953 S C R 677 (SC), *Poppatlal Shah* v. *State of Madras.*

> "The *situs* of an intangible concept like a sale can only be fixed notionally by the application of artificial rules invented either by Judges as part of the judge-made law of the land or by some legislative authority. But as far as we know, no fixed rule of universal application has yet been definitely and finally evolved for determining this for all purposes. There are many conflicting theories :
>
> "One, which is more popular and frequently put forward and is referred to and may, indeed, be urged to have been adopted by the Constitution in the *non obstante* clause of the Explanation, favours the place where the property in the goods passes, another which is said to be the American view and which was adopted in *Govindarajulu Naidu & Co.* v. *State of Madras*[140] fixes upon the place where the contract is concluded, a third which prevails in the continental countries of Europe prefers the place where the goods sold are actually delivered, a fourth points to the place where the essential ingredients which go to make up a sale are most densely grouped.
>
> "In this situation if the Explanation were not there and the ban under cl. (2) were to be raised unconditionally it would become necessary for the Courts to reach a conclusion and choose between these conflicting views."[141]

However, the question will have to be determined in the light of the provisions of the particular Sales Tax Act. It has been seen above, how in *Poppatlal Shah's case*,[142] the Supreme Court held that under the Madras Sales Tax Act, the place where the title passed would be the place where the sale took place. (See also Note 7.)

(t) " Dealer ", definition of — Importance in regard to taxing jurisdiction.

Another question that may arise under a particular sales-tax legislation (as distinct from any question under the Constitution) is whether the particular sales-tax law authorises a taxation of a 'dealer' in another State.

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139. 1955 S C 661 (681) (Pr 33) [AIR V 42 C 101] : (1955) 2 S C R 603 (S C).

140. 1953 Mad 116 [AIR V 40 C 36] (DB).

141. NOTE.—It is submitted with respect that (if the ban under cl. (2) is lifted) notwithstanding the Explanation to cl (1) (a), Courts will not be relieved of their duty to determine what constitutes the *situs* of a sale of goods of an inter-State character where the particular Sales Tax Act provides that only a sale which takes place within the State can be taxed. The Explanation to cl. (1) (a) of this article cannot be read as part of the Sales Tax Act.

142. 1953 S C 274 (277) [AIR V 40 C 63] : 1953 S C R 677 : 1953 Cri L Jour 1105 (SC), *Poppatlal Shah* v. *State of Madras*.

(It has been seen above that so far as the Constitution goes, if and when Parliament removes the ban under cl. (2) on inter-State sales, the power of the 'delivery' State under cl. (1) (a) Explanation will extend to the taxing of sellers outside the State or the buyers inside the State, as the State Legislature may think fit.)

For instance, the sales-tax laws of many States define a "dealer" as a person carrying on the business of buying and selling goods in the State. Such a territorial limitation in the definition of a dealer is contained in the sales-tax laws of Assam, Bengal, Bombay, Delhi Madhya Pradesh, Madhya Bharat, Hyderabad, Kutch, Manipur, Orissa, Pepsu, Rajasthan, Saurashtra, United Provinces and Vindhya Pradesh, although the actual collocation of words is not identical in all cases. In the sales-tax laws of Andhra, Bihar, Madras, Mysore, and Travancore-Cochin the definition of a 'dealer' does not contain such a limitation.

It is arguable that where the sales-tax law defines a 'dealer' as a person carrying on business in the particular State, an out-of-State dealer cannot be taxed under that law in respect of a sale under which title passes outside the State but the goods are delivered within the State for the purpose of consumption therein.

Such a point was raised in *Cement Marketing Co. of India Ltd.* v. *The State of Assam.*[143] But the contention was rejected in that case by the Assam High Court, as under the Assam Sales Tax Act, S. 2 (12), the definition of 'sale' includes a Proviso to the effect that even a sale which takes place outside the State will be deemed to take place within the State if the goods sold are delivered within the State, as a direct result of the sale, for the purpose of consumption therein, thereby showing that the out-of-State dealer, who sells goods to purchasers in Assam, may be treated as carrying on the business of selling *in* Assam, if the goods are delivered in Assam for the purpose of consumption therein. The Assam High Court rejected the contention that a person cannot be said to carry on business in a State unless he has a *place of business* in such State. A similar view was also taken by the Madras High Court in *Vakkan* v. *Government of Madras*[144] and by the Orissa High Court in *Madras Auto Service* v. *Assistant Collector of Commercial Taxes.*[145]

But in the case of Sales Tax Acts which do not contain a provision similar to the Proviso to S. 2 (12) in the Assam Act and which also define a dealer as a person carrying on the business of selling in the particular State, the ruling of the Assam High Court, above referred to, will not apply. In such cases, therefore, if the title to the goods passes in another State, it will be open to argument that under the particular Sales Tax Act a dealer in another State is not liable to tax even though he has sold goods to purchasers in the taxing State and the goods have been delivered in such State as a direct result of the sales for the purpose of consumption in such State.

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[143] 1955 Assam 113 (115) (Pr 5) [(S) AIR V 42 C 26] (DB).

[144] 1953 Mad 86 (91) (Pr 17) [AIR V 40 C 29] (DB).

[145] 1955 Orissa 122 (126, 127) [(S) AIR V 42 C 35] : ILR (1955) Cut 334 (DB), (The Orissa Act also (Orissa Sales Tax Amendment Act 1950) in defining "sale" contained an Explanation similar to the Proviso in the Assam Act above referred to—It was held that the sales must be treated as having taken place in Orissa for all purposes of the Act including the definition of 'dealer'.)

Where P, a merchant in State A sells goods to purchasers in State B, but the contract of sale, payment of price and the delivery of the goods all take place in State A although the goods are eventually brought into State B for consumption therein, P cannot be held to carry on business in State B, merely because orders for his goods were canvassed in State B.[146]

In this connection, the distinction between trading *with* a country and trading *within* a country, pointed out in *Grainger* v. *Gough*,[147] may be drawn attention to. In that case, Lord Herschell observed :

> "In the first place, I think there is a broad distinction between trading *with* a country and carrying on a trade *within* a country. Many merchants and manufacturers export their goods to all parts of the world, yet I do not suppose any one would dream of saying that they exercise or carry on their trade in every country in which their goods find customers. When it is said, then, that in the present case England is the basis of the business,

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146. *See* 1955 Orissa 122 (125) (Pr 3) [(S) AIR V 42 C 35] : I L R (1955) Cut 334 (DB), *Madras Auto Service* v. *Asst. Collector*, *Com. Taxes.* (If the assessee is simply canvassing for orders and has no power to finalise contracts and the contracts are finalised not within the jurisdiction of the taxing State but in other countries, it cannot be held that the proposed assessee is carrying on business or exercising trade by mere canvassing for orders within the territory of the taxing State—*Grainger and Son* v. *Gough* (1896) 1896 App Cas 325, *Greenwood* v. *Smidth and Co.* (1922) 1 App Cas 417, *Lovell and Christmas Ltd.* v. *Commr. of Taxes* (1908) 1908 App Cas 46 at P. 48, *Pachiammal* v. *Hindustan Co-operative Insurance Society*, AIR 1941 Mad 270 and *Municipal Council of Cocanada* v. *"Clan" Line Steamers Ltd.* AIR 1919 Mad 209, *Ref. to*—But it was held that in this case as the goods were delivered in Orissa for consumption the sale took place in Orissa under cl. (1) (a) Explanation of this article.)

(1896) 1896 App Cas 325 (335, 336) : 65 L J Q B 410, *Grainger & Son* v. *Gough*. (A foreign merchant who canvasses through agents in the United Kingdom for orders for the sale of his merchandise to customers in the United Kingdom does not exercise a trade in the United Kingdom within the meaning of the Income-tax Acts so long as all contracts for the sale and all deliveries of the merchandise to customers are made in a foreign country.)

147. (1896) 1896 App Cas 325 (335, 336) : 65 L J Q B 410, *Grainger & Son* v. *Gough.*

that the wine was to be consumed here, and that the business done would remain undone but for the existence of the customers in England, I cannot accept this as proof that M. Roederer carries on his trade in this country."

But in order to say that a person carries on business of selling goods in a State it is not necessary that he should reside or have a place of business in that State. The test is whether the sales take place in that State.[148]

A few stray and occasional cases of sales in a State will not amount to "carrying on business" in that State. It has to be found that the proposed assessee is habitually or systematically selling his goods in the State.[149]

(u) Question whether Sales Tax Act authorises taxation of seller or purchaser in case of inter-State sales.

Under some Sales Tax Acts, in the case of sales by merchants outside the State, under which the goods are delivered in the taxing State, the tax may be imposed only on the *purchasers* within the taxing State and not on the sellers who are outside the State. This is the case under the Bombay Sales Tax Act, as pointed out by the Supreme Court in the *United Motors' case.*[150] In such cases, therefore, there can be no question of imposing a tax on the outside seller. In such cases, (if and when Parliament lifts the ban under cl. (2)), cl. (1) (a) Explanation will only operate to validate the imposition of tax on the *inside purchaser*.

(v) Above questions only illustrative.

The instances given above for showing that although the ban under cl. (2) may be lifted by Parliament, out-of-State dealers may not be liable to taxation in all cases of inter-State sales are only illustrative and there may be further grounds under the respective Sales-tax Acts on which such exemption of outside dealers may be validly claimed. The question must be examined in each case on the provisions of the particular Sales Tax Act in question.

(w) Sales Tax Validation: Retrospective effect of Supreme Court decision in *Bengal Immunity Co.'s case.*

The President promulgated the Sales Tax Laws Validation Ordinance, 1956, in order to prevent the decision of the Supreme Court in the *Bengal Immunity Co.'s case*[151] from having a retrospective effect so as to affect the validity of taxation of inter-State sales and purchases that had taken place before the decision. This

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[148] 1953 Mad 86 (91) (Pr 17) [AIR V 40 C 29] (DB), *Vakkan* v. *Government of Madras.*

[149] 1955 Orissa 122 (126) (Pr 3) [(S) AIR V 42 C 35] : ILR (1955) Cut 334 (DB), *Madras Auto Service* v. *Asst. Collector, Com. Taxes.*

[150] 1953 S C 252 (258) (Pr 16) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

[151] 1955 S C 661 [AIR V 42 C 101] : (1955) 2 S C R 603 (S C), *Bengal Immunity Co.* v. *State of Bihar.*

Ordinance has since been re-enacted as the Sales Tax Laws Validation Act, (7 of 1956). For text of the Act, see NOTE 15.

(x) Whether Art. 301 is bar to taxation of inter-State sales and purchases

(x) Whether Art. 301 is bar to taxation of inter-State sales and purchases. —See Commentary on Art. 301.

4. Intra-State sales. — A sale of goods is a composite transaction involving several elements, such as agreement to sell, transfer of ownership, payment of price, delivery of goods and so forth, which may take place at different places.[1] Where all the ingredients in the transaction of sale take place within the same State and the transaction is a purely local or domestic one, there can be no dispute about its being subject to the taxing power of the State, as in such a case the sufficiency of the territorial *nexus* between the taxing State and the sale or the purchase which it seeks to tax, is obvious and beyond question.[2] The restrictions imposed by cl. (1)(a) read with the Explanation to that clause and cl. (2) apply only to inter-State sales and not to purely intra-State sales of the kind mentioned above.

In the *State of Bombay* v. *United Motors India Ltd.*,[3] it was held by the Supreme Court that the Explanation to cl. (1)(a) had the effect of converting, by legal fiction, an inter-State sale into a purely intra-State one and thus removing it from the ban imposed by cl. (2) on State taxation of sales in course of inter-State trade or commerce. But this view was overruled by the Supreme Court in *Bengal Immunity Co.* v. *State of Bihar*,[4] in which it was held that the *situs* of the sale was irrelevant to the question whether it took place in course of inter-State trade and commerce. (See also NOTE 3.)

5. Extra-State sales.—Under cl. (1)(a), it is expressly provided that no law of a State shall impose or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place outside such State. Where all the ingredients of a sale such as the agreement to sell, payment of price, passing of title, delivery of the goods, etc., take place outside a State, it is clear that the sale or purchase takes place outside the State, and that the State cannot tax such sale. But where the ingredients of a sale take place in different States, the question arises as to the true *situs* of the sale. In which

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Article 286 — Note 4

[1] 1953 S C 252 (257) (Pr 12) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

[2] 1955 S C 661 (722) (Pr 136) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC) *Bengal Immunity Co.* v. *State of Bihar.* (Tax on purely internal sale which occurs as a result of transportation of goods from a manufacturing centre within the State to a purchasing market in same State is permissible.)

1953 S C 252 (258) (Pr 15) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

[3] 1953 S C 252 (258) (Pr 16) [AIR V 40 C 62] : 1953 S C R 1069 (SC).

[4] 1955 S C 661 (682) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC).

of the several States in which the different ingredients occur does the sale take place? With reference to which of the several States concerned is it to be held that the sale takes place outside the State? It will be difficult in any given case to say which of the several ingredients making of the sale are the most essential. (See NOTE 3 (ss)). To solve this difficulty, the Explanation to cl. (1) (a) furnishes an easily applicable test for determining what is an outside sale. It provides by means of a legal fiction that for the purpose of cl. (1) (a) the State, in which the goods sold or purchased are actually delivered for consumption therein, is the State in which the sale or purchase is to be considered to have taken place, notwithstanding that the property in such goods passed in another State. Thus, the simple test is: Are the goods actually delivered in the taxing State as a direct result of a sale or purchase for the purpose of consumption therein? Then such sale or purchase shall be deemed to have taken place in that State and outside all other States. Thus, a sale, of which the ingredients take place in different States, is an outside sale for purpose of sales-tax with reference to all States other than the delivery State.[1] Thus, an outside sale can be of two kinds (i) a sale, of which all the ingredients take place outside the State, (ii) a sale of which one or more ingredients do take place in a State but under which the goods are not delivered in that State but in some other State. In the latter case, the sale is deemed to be an outside sale by virtue of the Explanation to cl. (1) (a), although partially at least it is not an outside sale. According to the Explanation, even where the title to the goods may pass in a particular State, the sale will be deemed to take place outside the State if the goods are actually delivered under the sale in another State for consumption therein.

The question has arisen whether the *non obstante* clause in the Explanation does not imply that under the general law the place where the title passes will determine the location of a sale or purchase, so that the Explanation to cl. (1) (a) must be understood only as providing that the sale must be deemed to take place in the delivery State *and also* in the State in which the title to the goods passes. If this question could be answered in the affirmative, it will be seen that a sale with *inter*-State characteristics will be an *intra*-State sale and not an outside sale not only in regard to the delivery State but also in regard to the State in which the title to the goods passes.

Article 286 — Note 5

[1] 1955 S C 765 (773) (Prs 26, 27) [(S) AIR V 42 C 106]: (1955) 2 S C R 483 (SC), *Ram Narain Sons Ltd.* v. *Asst. Commr. of Sales Tax* (Goods manufactured in Madhya Pradesh delivered for consumption in U. P. — State of Madhya Pradesh cannot recover sales-tax — Apart from the ban imposed by cl. (1) (a) taxation by Madhya Pradesh would also be precluded under cl. (2)).

But this view has been rejected by the Supreme Court in the *State of Bombay* v. *United Motors India Ltd.*[2] Bhagwati J., however, in that case considered that the State, in which the title to the goods passed, would also be a State in which the sale took place. But, at the same time, he held that the taxing power of such State in respect to such sale would be excluded by cl. (2) which prohibited the taxation of sales taking place in the course of inter-State trade until Parliament should lift the ban. Bhagwati J., however, in *Bengal Immunity Co.* v. *State of Bihar*,[3] recanted his earlier view and held that under the Explanation to cl. (1) (a), the sale can be held to take place only in the 'delivery' State and not in the 'title' State. (It has already been seen in NOTE 3 that under the ruling of the Supreme Court in the *Bengal Immunity Co.* v. *State of Bihar*[4] even the delivery State cannot tax such sale or purchase unless Parliament by law otherwise provides under cl. (2).)

In *Govindarajulu Naidu & Co.* v. *State of Madras*,[5] the Madras High Court expressed the view that the State, in which the agreement to sell is concluded, is the State in which the sale takes place for purposes of sales-tax and the question where the title to the goods passes was not material for such purpose. The Madras High Court further held that the Explanation to cl. (1) (a) has not the effect of making the sale an outside sale with reference to the State in which the contract is concluded. Hence, according to the Madras High Court in the above case, the power of such State to tax the sale is not affected by cl. (1) (a) read with the Explanation, although the delivery of the goods under the sale may take place in another State (which State, according to the Madras High Court, may impose a purchase or use tax on the goods). This view is also no longer good law after the decision of the Supreme Court in the *United Motors' case.*[6]

The decision of the Supreme Court in *Bengal Immunity Co.* v. *State of Bihar*[7] does not touch this point. According to the decision, the question of the exact effect of cl. (1) (a) Explanation can only be academic till the Parliament by law lifts the ban under cl. (2) on State taxation of sales and purchases in course of inter-State trade or commerce.

It may also be noted that in *Govindarajulu Naidu's case*,[8] the Madras High Court purported to follow the decision of the same Court in *Poppatlal Shah* v. *State of Madras.*[9] In that case, it was held that passing of the title was not the decisive factor to determine the *situs* of the sale, but that the place where the contract was concluded would be the place where the sale took place. This decision of the Madras High Court was reversed by the Supreme Court in *Poppatlal Shah* v. *State of Madras.*[10] The decision of the Supreme Court, however, did not turn on the present article but purely on the language of the Madras General Sales Tax Act, 9 of 1939, and it was held by the Supreme Court on the construction of the Act, that it was only in cases in which the title to the goods passed within the Province of Madras that the sale could be taxed under the Madras Act and the fact that the bargain was concluded in Madras was not sufficient for the purpose.

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[2] 1953 S C 252 (257) (Pr 12) [AIR V 40 C 62] : 1953 S C R 1069 (SC).

[3] 1955 S C 661 (706) (Pr 97) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC).

[4] 1955 S C 661 [AIR V 42 C 101] : (1955) 2 S C R 603 (SC).

[5] 1953 Mad 116 (127, 128) [AIR V 40 C 36] (DB).

[6] 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (SC). *State of Bombay* v. *United Motors (India) Ltd.*

[7] 1955 S C 661 [AIR V 42 C 101] : (1955) 2 S C R 603 (SC).

[8] 1953 Mad 116 [AIR V 40 C 36] (DB), *Govindarajulu Naidu & Co.* v. *State of Madras.*

6. Nexus theory under the article. — It has been seen in NOTE 3 that in the absence of any provision in the Government of India Act, 1935, corresponding to this article restricting the power of the Provincial Legislature to tax inter-Provincial sales, the sole criterion for determining whether a Province could tax a sale in a given case was the existence or otherwise of sufficient territorial *nexus* between the sale and the taxing State. It has also been seen in that Note that this was not a satisfactory test as it caused a great deal of uncertainty as to what would constitute a sufficient territorial *nexus* and also as it led to the same transaction being liable to be taxed by several States.

It has also been seen in NOTE 3 that as a result of the Explanation to cl. (1) (a) of this article the test of sufficient territorial *nexus* has been replaced by a simpler and more easily workable test.

But it must be noted that the principle of territorial *nexus* has not altogether ceased to operate even after coming into force of the article, although the application of the principle has been made very simple. The reason for this is that cl. (1) (a) read with the Explanation only prohibits a State Legislature from taxing a sale which takes place outside the State or must be deemed to take place outside the State according to the legal fiction enacted by the Explanation. But there is no such express provision enabling the delivery State to *tax* a sale, although under the legal fiction enacted by the Explanation, the sale is deemed to take place in the delivery State. The power which the 'delivery' State will get (if and when the Parliament lifts the ban under cl. (2)) to tax the sale will thus not be derived from cl. (1) (a) read with the Explanation. All that cl. (1) (a) read with the Explanation does is to leave the delivery State free to tax the sale which is deemed to take place within its borders, without being subjected to any prohibition. But the power to tax the sale is not derived from the article but is derived only from ART. 246 (3) read with SCH. VII, LIST 2, Entry 54. This has been expressly pointed out by the majority judgment of the Supreme Court in the *United Motors'* *case*.[1] The principle on which the taxing power is so derived is obviously the principle of territorial *nexus* as, in the eye of the law, (under the Explanation) the sale is one which takes place in the delivery State.

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[9] 1953 Mad 91 (94) (Pr 13, 14) [AIR V 40 C 30] : 1953 Cri L Jour 290 (DB).

[10] 1953 S C 274 (277) (Pr 9) [AIR V 40 C 63] : 1953 Cri L Jour 1105: 1953 S C R 677 (SC).

7. **The situs of a sale.** — It has been seen in NOTES 3, 4, 5 and 6 that this article makes the *situs* of the sale or the place where the sale takes place, one of the criteria for determining the jurisdiction of a State Legislature to impose or authorise the imposition of a tax on the sale. The Explanation to cl. (1) (a) further provides a simple and workable test for determining the *situs* of a sale, the component ingredients of which take place in different States. But this does not alter the fact that under cl. (1) (a) the test of jurisdiction is made to depend on the *situs* of the sale.

It is important to remember this, as otherwise it may be supposed that even under the Government of India Act, 1935, the *situs* of the sale was the test of jurisdiction and that this article only defines by means of the Explanation what the *situs* of a sale must be deemed to be in cases in which owing to the inter-State nature of the transaction, the question may otherwise be open to controversy. As already pointed out in NOTE 3, the mere provision in S. 100 cl. (3) of the Government of India Act, 1935, that a Provincial Legislature could make laws for a Province or a part thereof, did not, when read with Item 48 of Sch. VII, LIST 2 permitting the Provincial Legislature to make laws with respect to taxes on sale of goods, imply that such taxes could be imposed only on sales which took place within the Province, that is, in other words, on sales of which the *situs* was in the Province. The principle of sufficient territorial *nexus* did not imply that the *situs* of the sale must be within the taxing Province. The *situs* of the sale as the basic constitutional principle of jurisdiction for taxation has been introduced for the first time by this article.

Most of the provincial laws, however, as a matter of fact, made the *situs* of the sale the basis of the jurisdiction to tax. In other words, the sale was taxed if it took place within the taxing province. For instance, under the Madras General Sales Tax Act, 1939, the power to tax arose in regard to sales of goods which took place within

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Article 286 — Note 6

[1] **1953 S C 252 (258) (Pr 16) [AIR V 40 C 62] : 1953 S C R 1069 (SC),** *State of Bombay* v. *United Motors (India) Ltd.*

the Province. Notwithstanding this, a question arose as to when a sale could be said to have taken place in the Madras Province—whether the term 'sale' in the context referred to the bargain or contract or to the passing of title. This was the case in *Poppatlal Shah* v. *State of Madras.*[1] The Madras High Court held that the place where the contract was concluded would be the *situs* of the sale and not the place where the title passed. On this view it held that a sale, in respect of which the agreement was concluded in Madras but the goods were sent to Calcutta where also the title passed, could be taxed in Madras. This decision of the Madras High Court was reversed by the Supreme Court.[2] It was held by the Supreme Court that the question as to what was meant by the Madras Act by the expression "sale of goods in the Province of Madras" must be decided on a construction of the provisions of that Act. On this view, the Supreme Court held, after referring to the definition of sale in the Act which emphasized the aspect of *transfer of property*, that unless the property in goods passed in the Province of Madras the sale could not be taxed under the Act.

The above case illustrates how, even where an Act provides that only a sale which takes place within the province can be taxed, controversy may still arise as to when a sale can be said to take place within the province. Explanation to cl. (1) (a) solves the problem by providing a simple and workable test. But, as seen in NOTE 3, unless the Explanation has been incorporated in the particular Sales Tax Act, the Explanation cannot be relied upon for interpreting such Act. Moreover, under the ruling of the Supreme Court in *Bengal Immunity Co.* v. *State of Bihar*,[3] until and unless Parliament lifts the ban under cl. (2) on State taxation of sales and purchases in course of inter-State trade and commerce, a State will not be competent to tax a sale involving inter-State elements even though it may be covered by cl. (1) (a) Explanation.

In the absence of a provision like cl. (1) (a) Explanation in the Government of India Act, 1935, for determining the *situs* of a sale involving inter-State elements, each Province picked out one or more elements of the transaction of sale and made them the basis of its sales tax legislation.[4] A sale of goods involves several ingredients such

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Article 286 — Note 7

[1] 1953 Mad 91 (94) [AIR V 40 C 30] : 1953 Cri L Jour 290 (DB).

[2] 1953 S C 274 (276, 277) [AIR V 40 C 63] : 1953 Cri L Jour 1105 : 1953 S C R 677 (SC). *Poppatlal Shah* v. *State of Madras.*

[3] 1955 S C 661 (687) (Pr 48) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC).

[4] 1953 S C 333 (341) (Pr 32) [AIR V 40 C 78]: 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC), *State of Travancore Cochin* v. *Shanmugha Vilas Cashewnut Factory.* (Per *S. R. Das J.*)

as contract of sale, transfer of title, payment of price, delivery of goods, etc., and in the absence of any statutory provision governing the question it would be difficult to say where the sale takes place. (See NOTE 3 (ss).)

Another general feature of the sales tax legislation of most of the Provinces before the Constitution was that although 'sale' was first defined as meaning a transfer of property in the goods so as to make the passing of the property within the Province the principal basis for the imposition of the tax, yet, by means of explanation to that definition, it gave extended meaning to the word and thereby enlarged the scope of its operation. Thus, some of those Provincial Acts purported to tax a sale or purchase irrespective of the place where it took place, if only the goods were within the Province at the time when contract for sale or purchase was made, or the goods were produced or manufactured within the Province after the contract had been made.[5]

Thus, to sum up the difference in the constitutional position on this aspect of the question under the Government of India Act, 1935, and under this Constitution, the *situs* of the sale was not constitutionally required to be a basis of sales tax legislation of the Provinces. Although many of the Provincial Sales Tax Acts professed to tax only sales which took place within the Province and although "sale" was defined so as to stress the element of transfer of property, yet, by means of explanations and otherwise, each Province assumed jurisdiction to tax sales on the basis of one or more elements therein which took place within the Province although all the other elements took place outside. This article introduces a double change. *First*, it makes the *situs* of a sale the constitutional basis of a sales tax legislation of a State, and *secondly*, it provides a simple and workable test for determining the *situs* of a sale which involves inter-State elements. It must be remembered, however, that under the ruling of the Supreme Court in *Bengal Immunity Co.* v. *State of Bihar*[6] unless and until Parliament lifts the ban under cl. (2) on State taxation of sales in course of inter-State trade, a State cannot tax a sale involving inter-State elements even though it may be covered by cl. (1) (a) Explanation.

Where under the Explanation to cl. (1) (a) of this article, a sale or purchase cannot be deemed to take place within a particular State, a provision in a pre-Constitution Sales Tax Act under which the sale

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1953 S C 252 (256) (Pr 10) [AIR V 40 C 62] : **1953 S C R 1069 (SC),** *State of Bombay* v. *United Motors (India) Ltd.*

[5] **1953 S C 333 (341) (Pr 32)** [AIR V 40 C 78] : **1954 S C R 53: ILR (1954) Trav-Co. 1 (SC),** *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory.*

[6] **1955 S C 661 (687) (Pr 48)** [AIR V 42 C 101] : **(1955) 2 S C R 603 (SC).**

or purchase would be considered as taking place within such State would be void after the coming into force of the Constitution. (See NOTE 18.)

See also NOTE 3 (ss).

8. "Actually delivered as a direct result of such sale or purchase."—In order that a sale or purchase involving inter-State elements may be deemed under Explanation to cl. (1) (a) to take place in the State in which the goods are delivered for consumption, two conditions are necessary: (i) the goods must be actually delivered there, and (ii) the delivery must be as a direct result of sale or purchase. The words "actual delivery" can only mean, in the context, physical delivery of the goods and not merely constructive delivery, such as delivery by transfer of documents of title, etc.[1] The whole object of the Explanation is to give a power of taxation in respect of goods actually entering the State for the purpose of use therein and it would defeat such a purpose if notional delivery of goods, as by transfer of documents of title to the goods within the State, is held to give the State a power to tax, when the goods are actually delivered in another State.[2]

As regards delivery to a common carrier, the general principle is that where goods are delivered to a carrier for transmission to a buyer, the carrier is presumed to be the buyer's agent to take delivery.[3] (See Sale of Goods Act, 1930, S. 39.) But in the context of the Explanation to cl. (1) (a), delivery to a common carrier would not be an *actual* delivery within the meaning of the Explanation, as otherwise the Explanation would practically become useless.[4] As most inter-

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Article 286 — Note 8

[1] 1953 Mad 116 (128) (Pr 30) [AIR V 40 C 36] (DB), *Govindarajulu Naidu & Co.* v. *State of Madras.*

[2] 1953 Mad 116 (128) (Pr 30) [A I R V 40 C 36] (DB), *Govindarajulu Naidu & Co.* v. *State of Madras.*

[3] (1803) 127 E R 314 (316) : 7 R R 883, *Dutton* v. *Solomonson.*
1953 S C 252 (267) (Pr 52) [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.* (*Badische Anilin Und Soda Fabrik* v. *Basle Chemical Works*, 1898 App Cas 200 and *Badische Anilin Und Soda Fabrik* v. *Hickson*, 1906 App Cas 419, *Ref. to.*)

[4] 1955 S C 661 (754) (Pr 210) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC). *Bengal Immunity Co.* v. *State of Bihar.* (Per *Venkatarama Ayyar J.*)
1953 S C 252 (267) (Pr 52) [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.* (Bose J. *Note* : It is, however, worth noting that the majority judgment says nothing as to what is "actual delivery" and whether delivery to a common carrier or to the Post Office would be "actual delivery" within the meaning of the article.)

State sales involve transport of goods from one State to another by a common carrier, the result of holding that the delivery of goods to a common carrier is "actual delivery" within the meaning of the Explanation would be that in most cases the "delivery" would take place in a State which is different from that in which the goods are consumed, and the latter State will have no power to tax the sale, even if and when the Parliament lifts the ban under cl. (2) on State taxation of sales and purchases taking place in course of inter-State trade and commerce. This would be obviously against the intention of the provision.[5] But in *Mohammad Ishok* v. *The State of Madras*,[6] it was held by the Madras High Court that where under the contract of sale the goods were to be delivered "F. O. R." at P in State of Madras for transport to E in State of Travancore-Cochin where the goods were to be consumed, and the goods were so delivered and transported, the delivery must be held to have taken place in the State of Madras and not in the State of Travancore-Cochin.

In this connection, it may be pointed out that under S. 39 of the Sale of Goods Act, 1930, delivery to a carrier is only *deemed* to be a delivery to the buyer, while the Explanation to cl. (1) (a) requires an *actual* delivery. The language of S. 39 of the Sale of Goods Act seems to imply that the delivery to a carrier is not *actual* delivery.

The second requirement above mentioned is that the actual delivery must be as a direct result of the sale or purchase. Where A in Madras sends his agent to Bombay and the agent buys goods in Bombay and takes delivery of the goods in Bombay and sends them to A in Madras for the purpose of consumption in that State, although the goods may be actually delivered in Madras by this process, they cannot be said to be delivered in Madras as a direct result of the sale, because delivery as a direct result of the sale has already taken place in Bombay. Hence in such a case it is Bombay alone that can tax the sale and not Madras.[7]

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[5] 1953 S C 252 (258) [AIR V 40 C 62) : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.*

[*See* 1955 S C 661 (687) [AIR V 42 C 101] : (1955) 2 S C R 603 (S C), *Bengal Immunity Co.* v. *State of Bihar*. (This decision overrules the previous decision of the Supreme Court in *State of Bombay* v. *United Motors (India) Ltd.* : (AIR 1953 S C 252 (SC)) only on the question whether the delivery State has the power, immediately, and independently of Parliamentary legislation under cl.(2), to impose sales tax on an inter-State sale—It does not affect the point that if and when Parliament lifts the ban under cl. (2), the sale could be taxed only by the delivery State and not by any other State.)]

[6] 1955 Mad 502 (504) (Pr 9) [(S) AIR V 42 C 137] (DB). (Sale of Goods Act, S. 39 (1) was referred to. It was held that on the *terms of the contract* the delivery of the goods at Pollachi Junction was a delivery to the purchaser—Transport of goods to Ernakulam from Pollachi was really on behalf of buyer.)

[7] 1953 S C 333 (339) (Pr 19) [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut*

9. "For the purpose of consumption in that State." — Under the Explanation to cl. (1) (a), a sale involving inter-State elements will be deemed to take place in the delivery State only in those cases in which the goods are delivered in that State for the purpose of consumption therein. The word "consumption" has been thus defined in Webster's NEW INTERNATIONAL DICTIONARY, Vol. I, page 483 :

> "(3) Economics— The use of (economic) goods resulting in the diminution or destruction of their utilities; opposed to *production.* Consumption may consist in the active use of goods in such a manner as to accomplish their direct and immediate destruction, as in eating food, wearing clothes, or burning fuel; or it may consist in the mere keeping, and enjoying the presence or prospect of, a thing, which is destroyed only by the gradual processes of natural decay, as in the maintenance of a picture gallery. Generally, it may be said that consumption means using things, and production means adapting them for use : J. S. Nicholson."

Hence, delivery of goods for the purpose of consumption in the delivery State means delivery for the purpose of being *used* in such State.

But, according to the majority view in the *State of Bombay* v. *United Motors India, Ltd.*,[1] the 'consumption' in the delivery State need not be by the purchaser himself. The Explanation only requires that the goods must be intended for consumption in the delivery State, such consumption being either by the purchaser himself or by others

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Factory. (A in Travancore sending agent to Madras to buy goods for him and send them to him in Travancore—Travancore-Cochin State cannot tax the sale or purchase.)

1953 Mad 116 (126) [AIR V 40 C 35] (DB). *Govindarajulu Naidu & Co.* v. *State of Madras.* (A in Madras sending representative to Dacaa in Pakistan who purchases goods there, takes delivery and sends them to Madras—Madras cannot tax.)

1955 NUC (Andhra) 5839 [AIR V 42] (DB), *Vuddagiri Kanakaraju* v. *Andhra State.* (Goods sold and delivered in one State—Buyer subsequently removing goods to another State for consumption — Power of former State to tax is not affected.)

1955 N U C (Andhra) 5838 [AIR V 42] (DB), *Venkataraju* v. *State of Andhra.* (Goods sold and delivery effected to buyer in same State — Subsequently buyer removing them to another State for consumption—Explanation does not apply.) [*See* 1955 Mad 502 (503) [AIR V 42 C 137] (DB). *Mohammed Ishok* v. *State of Madras.* (Goods required under terms of contract to be delivered F. O. R. at Pollachi Junction in Madras State for transport to Ernakulam in Travancore-Cochin for consumption there — Held on terms of contract that delivery at Pollachi was actual delivery to buyer and so the delivery in Ernakulam was not as a direct result of the sale.)]

Article 286 — Note 9

[1] 1953 S C 252 (258) (Pr 15) [AIR V 40 C 62] : 1953 S C R 1069 (SC).

to whom he may subsequently sell the goods. In this connection, Patanjali Sastri, C. J., in delivering the judgment of the majority, observed as follows (at p. 258 of A. I. R. 1953 S. C.) :

> "It is to be noted that the Explanation does not say that the consumption should be by the purchaser himself. Nor do the words 'as a direct result' have reference to consumption. They qualify 'actual delivery.' The expression 'for the purpose of consumption in that State' must in our opinion be understood as having reference not merely to the individual importer or purchaser but as contemplating distribution eventually to consumers in general within the State. Thus all buyers within the State of delivery from out-of-State sellers, except those buying for re-export out of the State, would be within the scope of the Explanation and liable to be taxed by the State on their inter-State transactions."

Thus, although the Explanation requires that the delivery in the delivery State must be for the purpose of consumption therein, it is not necessary that the sale itself must be directly to a consumer. The Explanation is wide enough to cover both classes of cases, that is, those in which the delivery is directly to the consumer as well as those in which the delivery is to dealers who distribute to the consumers.

Bhagwati, J., however, in the same case took the view that delivery to a dealer would not be delivery for the purpose of consumption, although eventually the goods may be intended for consumption in the same State.[2]

But if a dealer in a State imported goods from another State only for the purpose of re-exporting them, the delivery in the importing State will not be for the purpose of consumption in that State and in such a case the sale will not be covered by the Explanation. This was the view of the majority of the Judges of the Supreme Court in the *United Motors' case.*[3] But Bose, J., dissented from this view and according to him even a dealer who stocks goods for sale or re-export may be said to consume them in the economic sense. He observed as follows[4] :

> "What after all does 'consumption' mean? In the economic sense it is just the use which a purchaser chooses to make of the goods purchased for his own purposes. He does not have to destroy them nor does he have to diminish their value or utility. A man who purchases a valuable piece of sculpture or painting for

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[2] 1953 S C 252 (272) (Pr 78) [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.*

[3] 1953 S C 252 (258) (Pr 15) [AIR V 40 C 62] : 1953 S C R 1069 (SC). *State of Bombay* v. *United Motors (India) Ltd.*

[4] 1953 S C 252 (266) (Pr 49) [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.*

preservation in a national museum does not destroy it nor does he use it himself except for the purposes of presenting it to the museum. But he is a consumer. In the same way, a man who purchases goods for use in his business so that his business can be carried on by the constant feeding of a stream uses the goods and therefore 'consumes' them even though he does not keep them himself."

The next question that arises is whether "consumption" will include the using of goods for manufacturing purposes. Thus, suppose yarn is imported by the handloom weavers of Madras from spinning mills of Bombay, for the purpose of being made into cloth. Can it be said that yarn is delivered in Madras State for purposes of 'consumption'? Other examples can be multiplied easily. On this question there is no decision of the Supreme Court or High Court which exactly covers the point. The quotation from Webster's Dictionary, which has already been given, seems to suggest that the employment of an article in producing something will not amount to consumption' of such article. Thus, if ground-nut is pressed and ground-nut oil is manufactured from the ground-nuts, it may be said that the oil manufacturer does not "consume" the ground-nut but uses it for *producing oil*.[5] But the point is not free from doubt, and opinions of two of the learned Judges of the Supreme Court seem to be in favour of ascribing to the word 'consumption' a wide meaning so as to include the use for manufacturing purpose. Thus, in *State of Travancore-Cochin* v. *Shanmugha Vilas Cashew-nut Factory*,[6] S. R. Das, J., in his dissenting judgment, observed as follows :

> "The next question is—was such delivery for the purpose of consumption in the State? The raw cashew-nuts, after they reach the respondents, are put through a process and new articles of commerce, namely, cashew-nut oil and edible cashew-nut kernels, are obtained. It follows, therefore, that the raw cashew-nut is consumed by the respondents in the sense I have mentioned. Consequently, such purchases will fall squarely within the Explanation and will be deemed to take place in Travancore, so that under cl. (1) (a) the neighbouring States will not be entitled to impose any tax on these sales or purchases."

The opinion of Bose J. in the *United Motors' case*[7] has already been referred to and it has been seen that he takes a very wide view of the word "consumption" so as to include any use which the purchaser chooses to make of the goods for his own purposes. According to him, even a merchant, who stocks goods for sale, consumes them. Hence, although he has not specifically referred to the question whether the use of an article for manufacturing purpose will amount to consumption thereof, yet the wide meaning which he ascribes to the word "consumption" would seem to indicate that according to him even use for a manufacturing purpose would amount to consumption.

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[5] *See* 1954 Hyd 1 (7) (Pr 18) [AIR V 41 C 1] : ILR (1953) Hyd 673 (F B), *Buchi Rajalingam* v. *State of Hyderabad.*

[6] 1953 S C 233 (354) (Pr 65) [A I R V 40 C 78] : 1954 S C R 53 : I L R (1954) Trav-Co 1 (SC).

[7] 1953 S C 252 (266) (Prs 49, 50) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

Though S. R. Das, J., expressed the above-mentioned view in his dissenting judgment in *State of Travancore-Cochin* v. *Shanmugha Vilas Cashew-nut Factory,*[8] the opinion of the majority of the Court in that case was not expressed on this point. In the view which the majority took of the case, they did not find it necessary to express their views about the scope of Explanation to cl. (1) (a) in the case. In the *United Motors case,*[9] the majority judgment only lays down that for the purpose of the Explanation, the consumption need not be directly by the purchaser and that delivery to a dealer also would be covered by the Explanation, provided the goods were intended for eventual distribution and consumption in the State itself. The Supreme Court had no occasion to express its opinion on the question whether use for manufacturing purposes would amount to consumption.

In *Buchi Rajalingam* v. *State of Hyderabad*[10] the question is merely raised without any definite expression of opinion.

In *Govindarajulu Naidu & Co.* v. *State of Madras,*[11] it was contended that the word "consumption" in the Explanation should be understood in the limited sense of eating and not in the wider sense of using. In this connection reference was made to the language of Entry 52 of List 2, where both "consumption" and "use" are used disjunctively. But the contention was rejected and in doing so it was pointed out that Entry 53 of the same List speaks of taxes on the "consumption or sale of electricity" and that obviously consumption here can only mean 'use'.

It may be pointed out that in *Govindarajulu Naidu's case*[12] the goods in question were hides and skins which obviously cannot be directly made use of without being subjected to a process of manufacture into leather goods. Nevertheless the goods were held to have been delivered for the purpose of consumption. This also supports

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8. 1953 S C 333 [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co. 1 (SC).

9. 1953 S C 252 (258) (Pr 15) [AIR V 40 C 62]: 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

10. 1954 Hyd 1 (7) (Pr 18) [AIR V 41 C 1] : ILR (1953) Hyd 673 (FB).

11. 1953 Mad 116 (128) (Pr 33) [AIR V 40 C 36] (DB).

12. 1953 Mad 116 (128) (Pr 33) [AIR V 40 C 36] (DB), *Govindarajulu Naidu & Co.* v. *State of Madras.*

the theory that 'consumption' will include use for a manufacturing purpose. Hence, it seems it would not be correct to confine the word "consumption" to non-productive user, and that use even in the process of production or adaptation for use would itself be an act of consumption.

In *Ganapathy Iyer* v. *Hyderabad State*,[13] the question was whether the exemption from sales-tax under the Hyderabad General Sales-tax Act, 1950, which was given to rice and flour, would apply also to eatables prepared from rice and flour. It was held that the exemption would not extend to such eatables. This decision also seems to support the theory that when a thing is adapted for use and a different commercial article is produced as a result, the original article suffers destruction and ceases to exist. In other words, it is "consumed". For, otherwise, the rice or flour out of which eatables are prepared would have to be treated as continuing to exist in the form of eatables so as to be entitled to exemption applicable to rice or flour.

The difficulty does not appear to be in recognizing that an article in essence is destroyed or consumed in its being used for producing another commercial article but the question seems to be really whether the word "consumption", as used in this article, means a purely destructive use (though the destruction may be a very gradual process) or whether it includes use for a productive purpose. On this question, the view of S. R. Das, J., of the Supreme Court is clear and unequivocal that even use for producing another article will amount to consumption. The wide meaning given to the word "consumption" by Bose, J., also supports the same theory. The decision of the Madras High Court in *Govindarajulu Naidu's case*[14] is also in favour of the same view, as already explained. But an authoritative pronouncement by the Supreme Court on this point seems to be necessary to make the position clear beyond doubt. In *Mohammad Ishok* v. *State of Madras*,[15] also, the Madras High Court expressed the opinion that purchase for a manufacturing purpose would be one for 'consumption.'

In *Indian Leaf Tobacco Development Co. Ltd.* v. *State of Madras*[16] it was doubted by the Madras High Court whether packing materials in which the goods sent to another State are packed can be said to be delivered in the latter State for purposes of consumption in that State.

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[13] **13.** 1954 Hyd 94 (94) (Pr 2) [AIR V **41** C 34] (DB).

[14] **14.** 1953 Mad 116 (128) (Pr 33) [AIR V **40** C 36] (DB), *Govindarajulu Naidu & Co.* v. *State of Madras*.

[15] **15.** 1955 Mad 502 (503) [(S) A I R V 42 C 137] (DB). (Ground-nut oil purchased by Tata Oil Mills Company for use in their mills is purchased for 'consumption'.)

[16] **16.** 1955 NUC (Mad) 1562 [A I R V 42] (DB). (*Note* : It seems that the "consumption" of the packing materials takes place in the State in which the goods are packed.)

In the case of a sale involving inter-State elements, the fact that the goods are delivered in another State for the purpose of consumption in that State is a question of fact to be proved by the party alleging it[17] and in the absence of such proof, the sale would not be taxable by any State even if and when the Parliament should have lifted the ban under cl. (2).

10. Sale or purchase in the course of inter-State trade or commerce (cl. 2) — General.—This article prohibits a State from imposing a tax on three classes of sales :

(a) Prohibitions on sales-tax imposed by article.

(a) sales which take place, or are deemed, under the Explanation to cl. (1) (a), to take place, outside the State;

(b) sales in the course of import into and export outside India ; and

(c) sales in the course of inter-State trade and commerce—in this case, the ban may be removed by legislation by Parliament (see NOTE 3.)

(b) Inter-relation between cl. (1) (a) read with Explanation and cl. (2).

As seen in NOTE 3, unless and until Parliament otherwise provides by law, a State cannot under cl. (2) impose a tax on a sale in the course of inter-State trade or commerce although such sale may be covered by cl. (1) (a), Explanation and may, therefore, be deemed as taking place within the 'delivery' State and hence as not being within the ban under cl. (1) (a). (See for full discussion NOTES 2 and 3.)

(c) Applicability of cl. (1) (a), Explanation material only for purpose of taxing power of delivery State.

From the above, it will be seen that in the case of inter-State sales under which goods are sent from State A to State B, the question about the scope of Explanation to cl. (1) (a) is material only in regard to the taxing power of State B, that is, the delivery State, because, it is only the taxing power of such State that would depend on the sale being covered by cl. (1) (a), Explanation. (As seen in NOTE 3 the taxing power of the 'delivery' State could be exercised only if and when Parliament lifted the ban under cl. (2).)

As regards the taxing power of State A, i.e., the State from which the goods are sent, the question of the applicability of cl. (1) (a), Explanation would be immaterial because whether the Explanation applied or not, State A would not be competent to tax the sale. If the Explanation applied, the sale would be deemed to take place in the delivery State, namely, State B, and outside State A. Thus, if the Explanation applied, the taxing power of State A would be excluded by cl. (1) (a). Where, on the other hand, the sale is not covered by the Explanation to cl. (1) (a), still the power of State A to tax the sale would be excluded, because, in such a case, the sale would be one in the course of inter-State trade and commerce and, as such, exempt from taxation under cl. (2).

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[17] 1955 NUC (Mad) 1562 [AIR V 42] (DB), *Indian Leaf Tobacco Development Co. Ltd.* v. *State of Madras.*

(d) Where Explanation to cl. (1) (a) does not apply, inter-State sale cannot be taxed by any State.

It will be seen from the above that where a sale of an inter-State character is not governed by the Explanation to cl. (1) (a), it will not be taxable at all either by State A from which the goods are sold or State B, the delivery State, or any other State, which may have territorial connection with the sale, and may otherwise have a right to tax the sale on the principle of sufficient territorial nexus.

(dd) Lifting of ban under cl. (2) by Parliament.

The opening words of cl. (2), namely, "Except in so far as Parliament may by law otherwise provide" clearly indicate that the lifting of the ban may be total or partial. In other words, Parliament may lift the ban wholly and unconditionally or it may lift it to such extent as it may think fit to do and on such terms as it pleases.[1]

(e) Effect of Proviso to cl. (2).

Under Proviso to cl. (2) sales and purchases in the course of inter-State trade and commerce which were liable to State taxation, prior to the commencement of the Constitution, would continue to be so liable till 31st March, 1951, notwithstanding cl. (2), if the President has ordered that they should be so liable. Under this Proviso, the President has issued Sales-Tax Continuance Order (C. O. 7 of 1950). Hence, in all those cases in which the President's Order would apply, the sale or purchase would be liable to State taxation where it was so liable prior to the Constitution, *notwithstanding that such taxation may be contrary to the provisions of clause (2).*

It must be noted that the President's Order can save the taxing power of the State only in so far as such taxing power conflicts with the provisions of cl. (2). Where such taxing power conflicts with cl. (1) of this article, the President's Order cannot save such power. Hence, even under the above President's Order, a sale involving inter-State elements cannot be taxed by any State other than the 'delivery' State.[2]

Thus, suppose A in Madras sells goods to B in Travancore. In such a case, the sale would have been liable to taxation both by Madras and Travancore before the Constitution. After the Constitution, if,

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Article 286 — Note 10

[1] 1955 SC 661 (678) (Pr 27) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co. v. State of Bihar.*

[2] 1955 S C 765 (769, 770, 773) (Prs 9, 14, 27) [(S) A I R V 42 C 106] : (1955) 2 S C R 483 (SC), *Ram Narain Sons Ltd. v. Asst. Commissioner of Sales Tax.* (Per Majority—Jagannadhadas J. contra.)
1955 Orissa 172 (175) (Pr. 12) [(S) A I R V 42 C 47] : I L R (1955) Cut 267 (DB), *B. C. Patel v. Sales Tax Officer.*

in such a case, the goods are delivered in Travancore as a direct result of the sale for the purpose of consumption in that State, the Explanation to cl. (1) (a) would come into play and the sale would be deemed to take place in Travancore and outside Madras. Consequently, the sale would be taxable by Travancore alone, *not* by Madras. The taxing power of the Madras State, which is excluded by cl. (1) (a), in such a case, cannot be revived by invoking the President's Order above referred to.[3]

Prior to the Constitution, there was no bar against the taxation of sales which, according to the test laid down in cl. (1) (a) Explanation, would be sales taking place "outside" the taxing State. Where the assessment is a single one covering the liability for the period both before and after the Constitution, and as regards the period after the Constitution, the assessment is bad as contravening cl. (1) (a) read with the Explanation, (notwithstanding the President's C. O. 7 of 1950), the entire assessment must be held to be invalid.[4]

(f) Onus of proof.

Prima facie, every sale involving inter-State elements would fall under cl. (2),[5] and, therefore, in cases in which the President's Order above referred to was applicable, the sale would be liable to taxation by all the States by which it would have been taxable prior to the Constitution. Where a party pleads that a sale was covered by Explanation to cl. (1) (a) and that hence the State *out of which* the goods were sent would not be competent to tax the sale, the burden of proof is on such a party to prove the facts necessary to bring the case within the Explanation, namely, that the goods were delivered in another State as a direct result of the sale and that the goods were meant for consumption in such State. In the absence of such proof, the exemption under cl. (1) (a) read with the Explanation could no be claimed and the sale would be taxable by virtue of the President's Order under Proviso to cl. (2).[6]

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[3] 1955 S C 765 (769) [(S) A I R V 42 C 106] : (1955) 2 S C R 483 (S C), *Ram Narain Sons Ltd.* v. *Asst. Commissioner of Sales Tax.*

1955 All 99 (102, 103) (Prs 3, 6) [(S) AIR V 42 C 35], *Kanpur Oil Mills* v. *Judge (Appeals) Sales Tax, Kanpur.* (If the ban of clause (1) comes into operation, the non-applicability of the ban under clause (2) of Art. 286 becomes immaterial and the taxation of the sale by the State law must be held to be void — Sale of goods by A in U. P. to purchasers in other States—Delivery in other States for consumption therein— U. P. cannot tax the sale by relying on President's C. O. 7 of 1950.)

1952 Nag 378 (385) (Prs 36, 37, 38) [A I R V 39] : I L R (1953) Nag 332 (DB), *Shriram Gulabdas* v. *Board of Revenue.*

[4] 1955 S C 765 (770) (Pr 16) [(S) A I R V 42 C 106] : (1955) 2 S C R 483 (S C), *Ram Narain Sons Ltd.* v. *Assistant Commissioner of Sales Tax.* (*Bennett and White (Calgary) Ltd.* v. *Municipal District of Sugar City No. 5*, (1951) App Cas 786 at p. 816, *Foll.*)

[5] 1953 Orissa 334 (336) [AIR V 40 C 97] : ILR (1953) Cut 553 (DB), *Sakhigopal Cocoanut Growers Co-operative Society* v. *State of Orissa.* (Sale in Orissa—Goods sent to M. P. and Bihar — If Orissa wants to tax a sale involving inter-State elements it will have to show that the delivery also took place in Orissa for the purpose of consumption.)

11. Sale in course of inter-State trade or commerce—Meaning.—Inter-State trade or commerce means trade or commerce between persons in different States. Hence, a sale in the course of inter-State trade or commerce implies necessarily that the parties to the sale are in different States at the time of the sale. Thus, if A in Madras sends his agent to Uttar Pradesh who makes purchases there on behalf of his principal and sends the goods from Uttar Pradesh to Madras, the sale does not take place in the course of inter-State trade or commerce. The sale is purely an intra-State sale taking place in Uttar Pradesh.[1]

In this connection, the following passage from Willis on CONSTITUTIONAL LAW OF THE UNITED STATES (1936 Edn., page 289) may be quoted :

> "Commerce becomes inter-State when it involves or concerns more States than one. Whenever there is traffic or commercial intercourse between a person in one State and a person in another State, there is inter-State commerce."

The following passage in the judgment of Chief Justice Marshall in *Gibbons* v. *Ogden*,[2] which bears on the meaning of the expression "commerce among the several States" in ART. 1, S. 8 (3) of the American Constitution, also brings out the distinction between inter-State and intra-State commerce :

> "The word 'among' means intermingled with. A thing, which is among others, is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior.

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[6] 1955 NUC (Mad) 1562 [AIR V 42], *Indian Leaf Tobacco Development Co. Ltd.* v. *State of Madras*.

1955 NUC (Mad) 1561 [AIR V 42], *East India Match Factory, Koilpatti* v. *State of Madras*.

[*See* 1953 Trav-Co 556 (557) (Pr. 1) [AIR V 40 C 213], *A. V. George & Co.* v. *Sales Tax Officer*. (In this case the case was remanded for ascertainment of the facts.)]

Article 286 — Note 11

[1] *See* 1953 Mad 116 (125, 126) (Pr. 26) [A I R V 40 C 36] (DB), *Govindarajulu Naidu & Co.* v. *State of Madras*. (Merchant in Madras sending agent to Dacca to purchase goods for him and send them to him at Madras — The sale is not one in course of import.)]

[*See also* 1953 S C 333 (339) (Pr 19) [A I R V 40 C 78] : 1954 S C R 53 : I L R (1954) Trav-Co 1 (SC), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashew-nut Factory*. (Travancore merchant sending agents to Madras State to purchase and send goods to him in Travancore State—Goods are not delivered in Travancore State as a direct result of the sale in the Madras State.)]

[2] (1824) 6 Law Ed 23 (69) : 9 Wheat 1 (194).

"It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose."

"Inter-State trade or commerce" does not imply that the dealing is between two *traders or merchants* belonging to the two States. A sale by a merchant in one State directly to a consumer in another State would also come within the meaning of the expression "inter-State trade or commerce."[3]

Inter-State trade will come to an end as soon as the goods have been delivered to the purchaser in the delivery State. Subsequent dealings by such purchasers or others in regard to the goods would not come under the category of inter-State trade.[4]

In regard to import and export out of India, it is now the settled law that the sale of imported articles after the import is complete or a purchase by the exporter for the purpose of export will not be covered by the expression "sale or purchase which takes place in the course of import or export".[5] But a sale, which itself directly occasions the export or a purchase which directly occasions the import, will be covered by the expression "sale or purchase which takes place in the course of import or export".[6] It is conceived that similar principles must be applied in determining whether a sale or purchase takes place in the course of inter-State trade or commerce.

It is not *necessary* that in order to constitute a sale or purchase in the course of inter-State trade or commerce, the sale or purchase must take place while the goods are in actual transit. But the sale or purchase effected while the goods are actually in transit from one State to another will be a sale which takes place in the course of inter-State trade or commerce on the same principle on which a sale or purchase while the goods are in actual transit from one country to another will be a sale or purchase which takes place in the course of import or export.[7] Thus, suppose A in Bombay State imports goods from the State of West Bengal and while the goods are on their way, transfers them to B. Both the original purchase by A and his sale of the goods to B will be transactions taking place in the course of inter-State commerce.

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[3] 1953 S C 252 (258) (Pr 17) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

1955 NUC (Andhra) 5839 [AIR V 42] (DB), *Kanakaraju & Sons* v. *Andhra State.*

[4] 1953 S C 252 (267) (Pr 53) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

[5] 1953 S C 333 (338) [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashew-nut Factory.*

[6] 1953 S C 333 (338) [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (S C), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashew-nut Factory.*

1952 S C 366 (367) [A I R V 39] : 1952 S C R 1112 : I L R (1953) Trav-Co 837 (SC), *State of Travancore-Cochin* v. *Bombay Co. Ltd.*

Suppose, a firm in Madras having a branch in Calcutta sends goods from Madras to Calcutta to its branch office. There being no sale or purchase in such a case, no question of liability to sales-tax will arise. If the branch office in Calcutta, after receipt of the goods, sells them to another person in Calcutta, the sale will be liable to tax by West Bengal. But suppose the sale was effected by the Calcutta branch while the goods were in transit, the question arises whether the sale can be said to take place in the course of inter-State trade or commerce.

In such a case, it is clear that the transport of goods from one State to another has not been occasioned by the sale so as to attract by analogy the principle laid down by the Supreme Court in *State of Travancore-Cochin* v. *Bombay Co. Ltd.*[8] and *State of Travancore-Cochin* v. *Shanmugha Vilas Cashew-nut Factory.*[9] But can it be said that the sale takes place while the goods are in actual transit in the course of inter-State trade or commerce ? It is clear that at the time of the sale the goods are not in transit in the course of inter-State *trade*, inasmuch as the goods are being sent only by a firm to its own branch. But the word "commerce" has been given a wide meaning by Chief Justice Marshall in *Gibbons* v. *Ogden*[10] so as to include not only trade but also intercourse such as navigation between States. It is doubtful, however, whether this wide meaning is permissible under the Constitution and whether the word "commerce" will include mere movement of goods from one State to another when there is no element of buying and selling involved. In this connection, it may be pointed out that ARTS. 301 and 302 of the Constitution use all the three expressions "trade", or "commerce" and "intercourse" thereby indicating that intercourse is not included in trade or commerce.

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[7] 1955 NUC (Andhra) 5839 [AIR V 42] (DB), *Kanakaraju and Sons* v. *Andhra State.*

[*See* 1953 S C 333 (338) (Pr 16) [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashew-nut Factory.*]

[8] 1952 S C 366 [AIR V 39] : 1952 S C R 1112 : ILR (1953) Trav-Co 337 (SC).

[9] 1953 S C 333 [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC).

[10] (1824) 6 Law Ed 23 (69) : 9 Wheat 1 (194).

In *Govindarajulu Naidu and Co.* v. *State of Madras*,[11] the opinion was expressed that where A in Madras sends goods to Calcutta having the railway receipt drawn in his own name and then while the goods are in transit sells the goods to another by endorsement of the railway receipt, the sale would be one in the course of inter-State commerce. It is doubtful whether this view is correct in view of what has been said above.

Goods may be moved from one State to another in the course of inter-State trade and commerce, in any manner and the exemption from sales-tax under cl. (2) will apply irrespective of the *mode* by which the goods are transported. Hence, a provision restricting the exemption to cases in which the goods are transported by certain specified modes would be *ultra vires*.[12]

The *situs* of a sale is irrelevant to the question whether it takes place in the course of inter-State trade or commerce.[13] (See NOTE 3.)

Where A in Bombay sells goods to B in Madhya Pradesh, and the goods are despatched from Bombay to Madhya Pradesh, the sale is one which takes place in the course of inter-State trade or commerce. The sale does not cease to be a sale of this description merely because A and B are both registered dealers under the Madhya Pradesh Sales Tax Act.[14]

12. Taxation of intra-State, extra-State and inter-State sales—Illustrative cases. — It will be convenient to illustrate the principles discussed in NOTES 3 to 11 above by means of certain examples :

(i) A, in State of Madhya Pradesh, sells goods to B in the same State. All the elements of the sale such as the bargain, the passing of the title, payment of consideration and delivery of the goods, take place in Madhya Pradesh.

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[11] 1953 Mad 116 (125) (Prs 23, 24) [AIR V 40 C 36] (DB).

[12] 1953 S C 252 (262) [A I R V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.* (Bombay Sales Tax Act (24 of 1952), Rules under, R. 5 (2) (i) restricting exemption to cases in which the goods are consigned through a railway, shipping or aircraft company, or country boat registered for carrying cargo or public motor transport service or by registered post—Rule *ultra vires.*)

[13] 1955 S C 661 (682) [A I R V 42 C 101] : (1955) 2 S C R 603 (S C), *Bengal Immunity Co.* v. *State of Bihar.* (Even assuming that the effect of cl. (1) (a), Explanation is to make the sale one taking place in the "delivery" State, this will not affect the fact that the sale takes place in the course of inter-State trade or commerce, and hence, until and unless Parliament lifts the ban under cl. (2), the sale cannot be taxed by the delivery State. (Overruling A I R 1953 S C 252 (SC).)

[14] 1955 S C 786 (788) (Pr 10) [(S) A I R V 42 C 110] : (1955) 2 S C R 509 (SC) *Mohanlal Hargovind Das* v. *State of M. P.*

The sale can be taxed only by Madhya Pradesh and not by any other State. (Clause 1 (a).) (See NOTES 4 and 5.)

(ii) A, in Bombay, sells goods to B in Madras. The property in the goods passes to B in Bombay. But the goods are actually delivered to B in Madras as a direct result of the sale. The goods are intended for consumption in Madras State. The sale cannot be taxed by Bombay, but can be taxed by Madras if and when Parliament lifts the ban under cl. (2). (See NOTE 3.)

(iii) In illustration (ii) above, goods are not intended for consumption in Madras but for re-export. In such a case, the sale would not be taxable either by Bombay or Madras even if and when Parliament should lift the ban under cl. (2).

(iv) A, in Madras, sends his agent B to Bombay to purchase certain goods for him, which B purchases and sends to A in Madras. In such a case, the sale is purely an intra-State transaction of the Bombay State and is liable to taxation only by Bombay and not by Madras, although the goods may be intended for consumption in Madras State.

(v) A, in Madras, orders certain goods from Bombay to be consigned to him by railway. On the delivery of the goods to the railway at Bombay, the title to the goods will pass to A. Nevertheless, as the goods will be *actually* delivered only in Madras, it is only Madras that would have power to tax the sale (if and when Parliament lifts the ban under cl. (2) and not Bombay). (See NOTE 8.)

(vi) A, a dealer in Madras, purchases goods from B who is in Bombay. The goods are delivered in Madras. Though A is only a dealer and not himself a consumer, the sale would be taxable in Madras (if and when Parliament lifts the ban under cl. (2)) and not in Bombay, if the goods are intended for consumption in Madras State.

(vii) A, a manufacturer in Bombay, imports from Madhya Pradesh the raw materials employed for his manufacture. The transaction would be taxable in Bombay (if and when Parliament lifts the ban under cl. (2)) and not in Madhya Pradesh. (See NOTE 9.)

(viii) A, in Bombay State, sells goods to purchasers in different States of India, who are consumers of the goods and to whom goods are sent by value-payable post. A can be taxed in respect of the sales by the different States in which the goods are delivered, if and when Parliament lifts the ban under cl. (2) and not till then.

(ix) A, in Madras, sells goods to B in Calcutta. The goods are sent by steamer. The shipping documents are sent to A's bankers in Calcutta to be delivered to B on payment of the price. It is held that the title passes in Calcutta. In such a case, though the bargain takes place in Madras and the contract is concluded in Madras, Madras will have no power to tax the sale. If the goods are intended for consumption in West Bengal, A can be taxed by West Bengal in respect of the sale, if and when Parliament lifts the ban under cl. (2).

(x) A, in Bombay, sells certain goods to B in Assam. At the time of the contract, the goods are in A's godown in Calcutta. The goods are despatched from Calcutta to Assam under A's orders. The goods are meant for consumption in Assam. The sale can be taxed by Assam State (if and when Parliament lifts the ban under cl. (2)) and not by Bombay or West Bengal.

(xi) A, in Bombay, orders goods from a merchant in Madhya Pradesh. The goods are meant for export outside India and not for consumption in the Bombay State. While the goods are in transit from Madhya Pradesh to Bombay, A transfers the goods to another export merchant in Bombay. Neither the first sale nor the second sale can be taxed and the exemption will apply both in regard to taxation by Bombay as well as by Madhya Pradesh.

(xii) A, a merchant of Cochin, comes to Madras State and makes certain contracts of sale there. The goods are delivered in Madras to the purchasers in pursuance of the contract and are meant for consumption in Madras State. The sale can be taxed by Madras State though the dealer is a non-resident person.[1]

(xiii) A, in Madras, purchases goods from B in Madras for the purpose of selling them to C in Bombay and sending them to Bombay. The sale by B to A in Madras is not exempt from taxation as being a sale in the course of inter-State trade.

(xiv) In the above example, the sale by A in Madras to C in Bombay will be taxable by Bombay (if and when Parliament lifts the ban under cl. (2) and not by Madras

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Article 286 — Note 12

[1] 1953 Mad 86 (90, 91) (Pr 17) [A I R V 40 C 29] (DB), *Vakkan v. Government of Madras.*

if the goods are meant for consumption in Bombay. If the goods are not meant for consumption in Bombay but for export outside India, the sale will not be taxable either by Bombay or Madras as it will be exempt under clause (2).

(xv) A in Madras purchases goods from B in Bombay. After taking delivery of the goods in Madras, A, who is a wholesale dealer, disposes of the goods to the retail dealers in Madras. The sales to the retail dealers by A are not sales in the course of inter-State trade and commerce and are not exempt under cl. (2). They can be taxed by the Madras State.

(xvi) A, a manufacturer in Madhya Pradesh, sends bidis to B, a stockist in Uttar Pradesh. B is not a purchaser of the bidis. He has power, however, to dispose of the goods as he thinks best on A's behalf. There is no sale or purchase either in Madhya Pradesh or Uttar Pradesh and so no liability to sales-tax is incurred in either of the States.[2]

(xvii) A, a manufacturer of bidis in Madhya Pradesh, sends goods to his own shops in Uttar Pradesh for sale in that State. A's sending of goods does not amount to a sale and no liability for sales-tax is incurred in either State.[3]

(xviii) A, a manufacturer of bidis in Madhya Pradesh, sends bidis to B in Uttar Pradesh, who is not a mere stockist on A's behalf but purchases the goods for sale on his own account. Sales-tax can be imposed on the transaction in Uttar Pradesh but not in Madhya Pradesh.[4] (But this can be done only if and when Parliament lifts the ban under cl. (2).)

(xix) A, in Madras, sells goods to B in Bengal. The goods are sent to Bengal by railway and are meant for consumption in Bengal. Railway receipt is sent to A's bank in Bengal to be delivered to B against payment. The sale can be taxed in Bengal if and when Parliament lifts the ban under cl. (2) and not in Madras.[5]

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[2] 1952 Nag 378 (Pr 51) [A I R V 39] : I L R (1953) Nag 332 (DB), *Shriram Gulabdas* v. *Board of Revenue.*

[3] 1952 Nag 378 (Pr 48) [A I R V 39] : I L R (1953) Nag 332 (DB), *Shriram Gulabdas* v. *Board of Revenue.*

[4] 1952 Nag 378 (Pr 51) [A I R V 39] : I L R (1953) Nag 332 (DB), *Shriram Gulabdas* v. *Board of Revenue.*

[5] 1953 S C 252 (257, 258) [A I R V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*
1952 Nag 378 (Pr 50) [A I R V 39] : I L R (1953) Nag 332 (DB), *Shriram Gulabdas* v. *Board of Revenue.*

(xx) A, in Madras, consigns goods to his own order or control in Calcutta. He then sells the goods by delivery of the relative documents to B, a Calcutta merchant. The goods are meant for consumption in West Bengal. The sale by A to B is taxable by West Bengal, not by Madras.[6] But even West Bengal could tax the sale only if and when Parliament lifts the ban under cl. (2).

(xxi) Both seller and buyer reside and carry on business in Gurgaon in Punjab. Seller has a godown in Delhi where his goods are stored and buyer has a retail shop in Delhi. Buyer and seller enter into contract in Gurgaon for sale of certain goods, under which goods are to be delivered from seller's godown to buyer's retail shop, both at Delhi, for consumption in State of Delhi. It is a possible view on these facts that the *situs* of the sale is at Delhi. As there is no movement of goods from one State to another it is possible to argue that there is no inter-State sale. In such a case, under cl. (1) (a) Explanation, Delhi would be able to tax the sale, and this would be a case of the Explanation being immediately applicable (i. e., even in absence of any enactment by Parliament lifting the ban under cl. (2) on taxation of sales and purchases taking place in course of inter-State trade or commerce) and Punjab cannot tax the sale, because, according to the Explanation, the sale would be outside Punjab.[7]

(xxii) A *bidi* manufacturer in Madhya Pradesh has branches and depots in Uttar Pradesh. He sends goods to these branches and depots to enable them to execute orders obtained by them. There is no sale between the manufacturer in M. P. and his own agents in U. P. The sales effected by the latter in U. P. take place completely in U. P. Hence, there is no occasion for Madhya Pradesh to levy any sales tax on the transactions.[8]

(xxiii) A *bidi* manufacturer in Madhya Pradesh sends goods to purchasers in U. P. The price is realised by sending bills and railway receipt through bank which hands over the railway receipt against payment. The sale is completed only in U. P. and Madhya Pradesh has no jurisdiction to impose sales-tax. Moreover, under cl. (1) (a) such taxation would come under the ban imposed by Explanation and cl. (2).[9]

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[6] *See* 1953 Mad 116 (125) [AIR V 40 C 36] (DB), *Govindarajulu Naidu & Co.* v. *State of Madras.*

[7] 1955 S C 661 (683) (Pr 38) [AIR V 42 C 101]: (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

[8] 1955 S C 765 (773) [(S) A I R V 42 C 106]: (1955) 2 S C R 483 (SC), *Ram Narain Sons Ltd.* v. *Assistant Sales Tax Commissioner.*

(xxiv) See also the undermentioned case.[10]

(a) Object of Cl. (1) (b).

13. Sales and purchases in course of import and export — Tax on. (Clause 1 (b)). — Under cl. (1) (b) of this article, a ban is imposed on the taxation of sales and purchases which take place in the course of the export and import trade of the country. Under Sch. VII List 1 Entry 83, the power of levying import and export duties has been conferred exclusively on the Central Legislature. The object of cl. (1) (b) of this article is to prevent the import and export trade of the country being subjected to double taxation — once in the form of sales or purchase tax levied by the States and again in the form of import and export duty imposed by the Centre.[1] Such double taxation would be detrimental to the foreign trade of the country, which, under Entry 41 of List 1 of Sch. VII, has been committed to the exclusive care of the Central Legislature. Moreover, double taxation of import trade would mean necessarily increased prices of commodities which may be of every day requirement for the people of the country. In this connection, the following observations of S. R. Das, J., in *State of Travancore-Cochin* v. *Shanmugha Vilas Cashew-nut Factory*[2] may be quoted:

> "If in addition to the import or export duty, which Parliament alone can impose, the State Legislatures were left free to make a law under Entry 54 in the State List levying another tax on a sale or purchase which takes place in the course of the import of the goods into or the export of the goods out of the territory of

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[9] 1955 S C 765 (773) [(S) A I R V 42 C 106] : (1955) 2 S C R 483 (SC), *Ram Narain Sons Ltd.* v. *Assistant Sales Tax Commissioner.*

[10] 1954 Mad 621 (623) [A I R V 41 C 221] (DB), *Kutty Keya* v. *The State.* (Madras Commercial Crops Markets Act (20 of 1933), S. 11—Tax on commercial crops bought and sold in notified area is not tax on sale in course of inter-State trade, merely because it is provided that all commercial crops leaving a notified area shall be presumed to have been bought and sold in such area until the contrary is proved—Such a provision merely enacts a rule of *evidence* and does not create a substantive liability.)

Article 286 — Note 13

[1] 1953 S C 333 (336, 337) (Pr 12) [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashew-nut Factory.* (But even limiting the exemption under cl. 1 (b) to the sale or purchase which itself occasions the export or import secures this object and it is not necessary to extend the exemption to purchases for purpose of export or first sales after import.)

1952 S C 366 (368) [AIR V 39] : 1952 S C R 1112 : ILR (1953) Trav-Co 337 (SC), *State of Travancore-Cochin* v. *Bombay Co. Ltd.*

[2] 1953 S C 333 (346) (Pr 46) [A I R V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC).

India, such double taxation will necessarily increase the price of the goods. Such imposition may easily result in our not getting imported goods which may be of every day requirement at a reasonable price or our not being able to compete in the world market with our exported goods. This will discourage and hamper our foreign trade and eventually affect the Union revenue. It is to avoid that calamity that ART. 286 (1) (b) was introduced in the Constitution."

But at the same time, the securing of adequate finances to the States to carry on their administration is also an important consideration which must be remembered and given due weight to in determining the extent of protection conferred by this clause, in so far as there may be room for the importation of such considerations into the question. In this connection, Patanjali Sastri, C. J., observed as follows, in delivering the majority judgment in *State of Travancore-Cochin* v. *Shanmugha Vilas Cashew-nut Factory* :[3]

> "It is true, as pointed out in the previous decision, that the export-import trade is important to our national economy, but it is no less true that the State power of taxation is essential for carrying on its administration, and it must be as much the constitutional purpose to protect the one as not unduly to curtail the other. The question really is, how far did the Constitution-makers want to go in protecting the foreign trade by restricting the power of taxing sales or purchases of goods which they conferred on the States under Entry 54 of LIST 2. The problem before them was one of balancing and reconciling the rival claims of foreign trade in the interests of our national economy and of the State's power of taxation in the interests of the expanding social welfare needs of the people committed to its charge, and we have their solution as expressed in the terms of cl. (1) (b). It is for the Court to interpret the true meaning and scope of those terms without assuming that the one constitutional purpose was regarded as more important than the other. This Court has already held in the previous decision that cl. (1) (b) protects the export-import trade of this country from double taxation by prohibiting the imposition of sales-tax by the State on export sales and import purchases, and we find no warrant in the language employed to extend the protection to cover the last purchase before export or the first sale after import."

(b) Clause (1)(b) whether redundant.

The question may be raised whether cl. (1) (b) is really not redundant in so far as it may be held to ban State taxation of a sale or purchase under which an export or import takes place. It may be argued that a tax on such sale or purchase is really a tax on the export or import, and as such already beyond the competence of the State Legislature to impose, inasmuch as the matter is within the exclusive legislative jurisdiction of the Centre. But this line of reasoning would not be correct, inasmuch as it cannot be definitely asserted that the two taxes are identical, and in the absence of a provision like cl. (1) (b) it may well be argued that taxation of a sale or purchase, under which an export or import takes place, is within the competence of the State. In this connection, the observations of Patanjali Sastri, C. J., delivering the judgment of the Supreme Court in the *State of Travancore-Cochin* v. *Bombay Company Ltd.*,[4] may be quoted:

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[3] 1953 S C 333 (337, 338) (Pr 14) [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC).

> "It might well be argued, in the absence of a provision like cl. (b) prohibiting in terms the levy of tax, on the sale or purchase of goods where such sales and purchases are effected through the machinery of export and import, that both the powers of taxation, though exclusively vested in the Union and the States respectively, could be exercised in respect of the same sale by export or purchase by import, the sales-tax and the export duty being regarded as essentially of a different character. A similar argument induced the Federal Court to hold in *Province of Madras* v. *Boddu Paidanna and Sons*,[5] that both central excise duty and provincial sales-tax could be validly imposed on the first sale of ground-nut oil and cake by the manufacturer or producer as 'the two taxes are economically two separate and distinct imposts'. Lest similar reasoning should lead to the imposition of such cumulative burden on the export-import trade of this country which is of great importance to the nation's economy the Constituent Assembly may well have thought it necessary to exempt *in terms* sales by export and purchases by import from sales-tax by inserting ART. 286 (1) (b) in the Constitution."

(c) Exemption applies though sale takes place within the State.

Under this clause, even though the sale or purchase takes place within the State, it would be exempt from taxation by the State, if it takes place in the course of the export or import of the goods out of India.[6] In fact, if the sale took place outside the State, there would be no need to resort to this clause at all as the sale would be exempt from taxation under cl. (1) (a) itself. Prior to the Constitution the position was different: if property in the goods exported passed to the foreign buyer outside India, the export sale would not be taxable in India; but not so if the sale was complete in India itself.[7]

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[4] 1952 S C 366 (368) (Pr 12) [AIR V 39]: 1952 S C R 1112 : ILR (1953) Trav-Co 337 (SC).

[5] 1942 F C 33 [AIR V 29] (FC).

[6] 1952 S C 366 (368) (Pr 10) [A I R V 39] : 1952 S C R 1112 : I L R (1953) Trav-Co 337 (SC), *State of Travancore-Cochin* v. *Bombay Co. Ltd.* (Export-sale is exempt from taxation by State even though the property in the goods may have passed to the foreign buyer within the State before the goods commenced their outward journey.)

1955 Mad 314 (320) (Pr 13) [(S) A I R V 42 C 88] : I L R (1955) Mad 579 (FB), *State of Madras* v. *K. H. Chambers.*

(d) 'Sale' or 'purchase' may take place either in export or import.

The words "where such sale or purchase takes place in the course of the import of the goods into or the export of the goods out of the territory of India" have to be understood in a collective and not distributive sense, and they do not mean that the sale must take place in the course of export and that the purchase must take place in the course of import in order to be exempt from taxation under this clause. The exemption is applicable whether the transaction that takes place in the course of export or import is a sale or purchase.[8]

(e) Scope and meaning of clause: Effect of Supreme Court decisions.

When can a sale or purchase be said to take place "in the course of import or export" within the meaning of this clause? The answer to this question has been settled by the two decisions of the Supreme Court, *State of Travancore-Cochin* v. *Bombay Co. Ltd.*,[9] (the first Travancore case) and *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory*[10] (the second Travancore case). The law as thus settled can be summarised as follows[11]:

(i) A sale under which the export takes place and a purchase under which the import takes place are exempt from taxation under cl. (1) (b).

An "export sale" for the above purpose is one in which the *assessee* figures as an exporter, privity having been established between him and the foreign buyer, either through direct negotiation or dealing or through the local representatives of the latter.[12]

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[7] **7.** 1954 Mad 1029 (1029) [A I R V 41 C 359] (DB), *State of Madras* v. *Mysore Lachia Shetty & Sons Ltd.* (Bill of lading taken to order of *seller* to be delivered to buyer in foreign country through bank — Title passes in foreign country and sale cannot be taxed in India)

[8] **8.** 1955 Mad 314 (323) (Pr 27) [(S) AIR V 42 C 88] : ILR (1955) Mad 579 (FB), *State of Madras* v *K H Chambers.*

[9] **9.** 1952 S C 366 [AIR V 39] : 1952 S C R 1112 : ILR (1953) Trav-Co 337 (SC).

[10] **10.** 1953 S C 333 [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC).

[11] **11.** 1953 S C 333 (338) (Pr 16) [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory.*

[12] **12.** 1955 Mad 722 (725) (Pr. 15) [(S) AIR V 42 C 232] (DB), *Gandhi Sons* v. *State of Madras.* (A sale will occasion an export or there will be an export sale only where the sale is to a foreign buyer with whom the local seller has privity and when as a direct result of such sale the goods are transported across the frontier. Where merchants in Bombay who entered into their respective contracts with the assessees were themselves the purchasers, whether their purchases were on their own behalf or undisclosed foreign principals between the latter of whom and the assessees there was no privity and undoubtedly a

(ii) Purchases in the State by the exporter for the purpose of export as well as sales in the State by the importer after the goods have crossed the customs frontier are not within the exemption.

(iii) Sales in the State by the exporter or importer by transfer of shipping documents while the goods are beyond the customs frontier are within the exemption, assuming the State power of taxation extends to such transaction.[13]

The above propositions were laid down by the Supreme Court in *Shanmugha Vilas Cashewnut Factory's case*,[14] as representing the conclusions of the Court. As regards the first of the above propositions it had already been laid down by the Supreme Court in the *Bombay Company's case*.[15]

(f) Four views as to scope and meaning of clause.

In the *first Travancore case*[16] the Supreme Court referred to four different views adumbrated in the course of the argument before it as to the meaning and scope of cl. (1) (b) as follows :

(1) The exemption is limited to sales by export and purchases by import, that is to say, those sales and purchases which occasion the export or import, as the case may be, and extends to no other transactions, however directly or immediately connected, in intention or purpose, with such sales or purchases, and wheresoever the property in the goods may pass to the buyer.

(2) In addition to the sales and purchases of the kind described above, the exemption covers the last purchase by the exporter and the first sale by the importer, if any, so directly and proximately connected with the export sale or import purchase as to form part of the same transaction.

(3) The exemption covers only those sales and purchases under which the property in the goods concerned is transferred

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sale took place—*Held*, that the assessees were not the seller who exported or whose sales occasioned the export: AIR 1952 S C 366 (SC), Applied.)

[13] *See* 1955 Mad 722 (728) [(S) AIR V 42 C 232] (DB), *Gandhi Sons* v. *State of Madras.* (C and F contracts for sale of goods entered into by assessees with merchants in Bombay—Goods to be exported from Cochin harbour to foreign destinations by assessees on account and risk of buyers—Appropriation of goods to contract, by packing and marking but appropriation not unconditional as seller had further duties like loading on board, etc , and was also entitled to payment in exchange of shipping documents—*Held*, property in the goods did not pass to the buyers until the relevant bills of lading were presented to buyers or in any event at least not until goods were put on board the vessels — Hence the sale took place while the goods were in course of export.)

[14] 1953 S C 333 (338) [AIR V 40 C 78] : 1954 S C R 53 : I L R (1954) Trav-Co 1 (S C), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory.*

[15] 1952 S C 366 (368) [AIR V 39] : 1952 S C R 1112 : I L R (1953) Trav-Co 337 (S C), *State of Travancore-Cochin* v. *Bombay Co. Ltd.*

[16] 1952 S C 366 (367) (Pr. 9) [AIR V 39] : 1952 S C R 1112 : I L R (1953) Trav-Co 337 (S C), *State of Travancore-Cochin* v. *Bombay Co. Ltd.*

from the seller to the buyer during the transit, that is, after the goods begin to move and before they reach their foreign destination.

(4) The clause is not restricted to the point of time at which goods are imported into or exported from India; the series of transactions which necessarily precede the export or import of goods will come within the purview of the clause.

The Supreme Court, however, found it unnecessary for the purpose of the cases then before it to go any further than to hold that "whatever else may or may not fall within ART. 286 (1) (b), sales and purchases which themselves occasion the export or import of the goods, as the case may be, out of or into the territory of India come within the exemption," and that the third view set out above, which seeks to limit the operation of the clause exclusively to sales and purchases effected during the transit of the goods was too narrow and could not be accepted.

The Supreme Court again referred to the above four views in the *State of Travancore Cochin* v. *Shanmugha Vilas Cashewnut Factory*[17] and, after stating the scope of the previous decision, considered the other aspects which were not covered by the previous decision, and formulated its conclusions in the form of the three propositions which have already been set forth above.

(g) How above views were dealt with by Supreme Court.

As stated above, the Supreme Court in the *first Travancore case*[18] had already rejected the view that the scope of the clause was limited to cases in which the sale or purchase took place while the goods were actually in transit. But it had not decided whether such sale or purchase would be covered by the clause. The decision in the *second Travancore case*[19] covers this point and specifically holds that such sales and purchases are within the exemption of the clause.

In the *second Travancore case*,[20] the Supreme Court rejected the view that the clause is wide enough to apply to include the series of transactions which necessarily precede export or follow import of goods. This view had found favour with the Travancore High Court.[21] But in the *first Travancore case*[22] the Supreme Court did not find it necessary to pronounce upon its correctness. In the *second Travancore case*,[23] the Supreme Court definitely pronounced the view to be incorrect and as being too wide.

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[17] 1953 S C 333 (335, 338) (Prs. 5, 16) [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (S C).

[18] 1952 S C 366 (367) (Pr. 10) [AIR V 39] : 1952 S C R 1112 : I L R (1953) Trav-Co 337 (S C), *State of Travancore-Cochin* v. *Bombay Co. Ltd.*

[19] 1953 S C 333 (338) (Pr. 16) : [AIR V 40 C 78] : 1954 S C R 53 : I L R (1954) Trav-Co 1 (S C), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory.*

[20] 1953 S C 333 (336) (Pr. 11) [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (S C), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory.*

[21] 1952 Trav-Co 83 (84) (Pr. 3) [AIR V 39 C 35] (DB), *Bombay Company Ltd., Alleppey* v. *State.*

[22] 1952 S C 366 [AIR V 39] : (1952) S C R 1112 : ILR (1953) Trav-Co 337 (S C), *State of Travancore-Cochin* v. *Bombay Co. Ltd.*

As regards the remaining two views out of the four mentioned above, the Supreme Court in the *first Travancore case*[24] had already held that the exemption under clause (1) (b) would cover sales and purchases under which the export and import took place. The Supreme Court had, however, not decided whether the clause would cover other categories of sales and purchases. In the *second Travancore case*[25] the Supreme Court definitely expressed its conclusion that the clause would *not* cover transactions *anterior to the export or subsequent to the import*. In doing so, the Supreme Court not only rejected the broad view that had been taken by the Travancore High Court, namely, that the clause would cover the entire series or chain of transactions that led up to the export or followed the import, but also went further and held that the clause would not cover the purchase made by an exporter for the purpose of the export and the first sale made by the importer for the purpose of disposing of the goods imported by him.

(h) Summing up of effect of the two decisions

Thus, to sum up the effect of the two decisions, in the *first Travancore case*[26] the Supreme Court laid down that cl. (1) (b) would apply to a sale under which goods are exported and a purchase under which goods are imported. In doing so, the Supreme Court rejected the view that the clause was limited to sales and purchases which took place while the goods were actually in transit. In the *second Travancore case*,[27] the Supreme Court *added* two propositions to the law as laid down in the *first Travancore case*.[28] These propositions were :

(i) that the purchase by an exporter for the purpose of export or a sale by an importer after the goods are imported, as also the chain of transactions anterior to the sale or subsequent to the import, are *not* covered by the clause ;

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23. 1953 S C 333 (336) [AIR V 40 C 78] : 1954 S C R 53 : I L R (1954) Trav-Co 1 (S C), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory*.

24. 1952 S C 366 (368) (Pr. 14) [AIR V 39] : 1952 S C R 1112 : I L R (1953) Trav-Co 337 (S C), *State of Travancore-Cochin* v. *Bombay Co. Ltd.*

25. 1953 S C 333 (336) [AIR V 40 C 78] : 1954 S C R 53 : I L R (1954) Trav-Co 1 (S C), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory*.

26. 1952 S C 366 (368) [AIR V 39] : 1952 S C R 1112 : I L R (1953) Trav-Co 337 (S C), *State of Travancore Cochin* v. *Bombay Co. Ltd.*

27. 1953 S C 333 (338) (Pr. 18) [AIR V 40 C 78] : 1954 S C R 53 : I L R (1954) Trav-Co 1 (S C), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory*.

28. 1952 S C 366 [AIR V 39] : 1952 S C R 1112 : ILR (1953) Trav-Co 337 (S C), *State of Travancore-Cochin* v. *Bombay Co. Ltd.*

(ii) that a sale or purchase by transfer of shipping documents while the goods are in course of the transit will be covered by the clause.

(i) Reasoning on which conclusions of Supreme Court were based.

The conclusions of the Supreme Court as to the scope and meaning of the sub-clause may now be considered with reference to the reasoning on which they are based.

(j) First proposition: Clause not limited to sales or purchases while goods are actually in transit—Clause covers export sales and import purchases.

The first proposition settled by the Supreme Court is that the phrase "in the course of the import or export of goods" does not imply that the sale or purchase must necessarily take place after the process of import or export has actually started and before the process has ended by the landing of the goods. In other words, the words "in the course of import or export" do not mean that the sale or purchase of the goods must take place while the goods are actually in transit in their journey from one country to another. No doubt, a sale or purchase which takes place by the transfer of shipping document while the goods are on the high seas in actual transit from one country to another, would be a sale or purchase which takes place "in the course of import or export" within the meaning of the clause. But the clause is not limited to such sales or purchases. The clause would cover sales and purchases under which the goods are exported or imported, although in the strict etymological sense of the expression "in the course of," such sales or purchases cannot be said to take place in the course of the export or import, inasmuch as the etymological sense would require that the export or import must have actually started and must be in progress when the sale or purchase takes place. This point has been settled by the *first Travancore case.*[29]

The reasoning on which this view was based by the Supreme Court in that case is that a sale under which export takes place or a purchase under which import takes place is a transaction which is inseparable from the export or the import and can very well be said to form part of the course of export or import.

The sales in question in that case were export sales of the respective commodities to foreign buyers on c.i.f. or f.o.b. terms and the State of Travancore-Cochin sought to tax the sales. The Supreme Court held the sales to be exempt from taxation under cl. (1) (b). The Supreme Court observed as follows at pp. 367, 368 of A. I. R. 1952 S. C. :

> " We are clearly of opinion that the sales here in question which occasioned the export in each case, fall within the scope of

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[29] 1952 S C 366 (367, 368) [AIR V 39] : 1952 S C R 1112 : ILR (1953) Trav-Co 337 (S C), *State of Travancore-Cochin* v. *Bombay Co. Ltd.*
[*See also* 1954 Mad 1029 (1029) (Pr. 3) [AIR V 41 C 359] (DB), *State of Madras* v. *Mysore Lachia Shetty and Sons Ltd.* (Export-sale and import-purchase are covered by cl. (1) (b).)

the exemption under ART. 286 (1) (b). Such sales must of necessity be put through by transporting the goods by rail or ship or both out of the territory of India, that is to say, by employing the machinery of export. A sale by export thus involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export form parts of a single transaction. Of these two integrated activities, which together constitute an export sale, whichever first occurs can well be regarded as taking place in the course of the other. Assuming without deciding that the property in the goods in the present cases passed to the foreign buyers and the sales were thus completed within the State before the goods commenced their journey as found by the Sales-tax Authorities, the sales must, nevertheless, be regarded as having taken place in the course of the export and are, therefore, exempt under ART. 286 (1) (b). That clause, indeed, assumes that the sale has taken place within the limits of the State and exempts it if it takes place in the course of the export of the goods concerned."

It may be noted that in the above passage the Supreme Court took the view that the sales should be held to take place in the course of export even on the assumption that the property in the goods passed to the foreign buyers and the sales were completed within the State before the goods commenced their outward journey.

(k) Argument as to redundancy answered.

It was argued before the Supreme Court that on the construction indicated above a sale in the course of export would practically become synonymous with "export" and would reduce cl. (b) to a mere redundancy, because ART. 246 (1) read with Entry 83 of LIST 1 of SCH. 7 vests legislative power with respect to "duties of customs, including export duties" exclusively in Parliament and that would be sufficient to preclude State taxation of such transactions. The Supreme Court saw no force in the suggestion and pointed out that in the absence of a provision like cl. (b) prohibiting in terms the levy of tax on the sale or purchase of goods where such sales and purchases are effected through the machinery of export and import, it might well be argued that both the powers of taxation, though vested exclusively in the Union and the States respectively, could be exercised in respect of the same sale by export or purchase by import, the sales-tax and the export duty being regarded as being essentially of a different character. The Supreme Court pointed out that a similar argument induced the Federal Court in

The Province of Madras v. *Boddu Paidanna and Sons*,[30] that both Central excise duty and Provincial sales-tax could be validly imposed on the first sale of ground-nut oil and cake by the manufacturer or producer, as the two taxes are economically two separate and distinct imposts. The Supreme Court observed that lest similar reasoning should lead to the imposition of such cumulative burden on the export-import trade of the country which was of great importance to the nation's economy, the Constituent Assembly might well have thought it necessary to exempt in terms sales by export and purchases by import from sales-tax by inserting ART. 286 (1) (b) in the Constitution.

(l) Etymological sense of "course" not to be overemphasised.

The Supreme Court, as already stated, rejected the contention that the clause was limited to sales and purchases which took place while the goods were actually in transit. According to the Supreme Court such a view places undue emphasis on the etymology of the word "course" and formulates a mechanical test for the application of clause (b) and places too narrow a construction upon that clause which would, if accepted, rob the exemption of much of its usefulness.

(m) The "Stream" theory of America not applicable.

In this connection, the Supreme Court referred to the "stream theory" of American decisions relating to the commerce and import-export clauses of the American Constitution, and held that the theory was not applicable to the Indian Constitution and could not be relied on in interpreting the scope and meaning of cl. (1) (b). The "stream theory" may be briefly explained as follows:

It has been seen in NOTE 1 that under the American Constitution, the power of regulating commerce with foreign nations and among the several States is vested in the Congress (ART. I S. 8 (3) — Commerce clause). Similarly, under ART. I, Sec. 9 (5) of the American Constitution no tax or duty shall be laid on articles exported from any State, and under ART. I, Sec. 10 (2), no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. The latter two provisions are commonly known as import-export clauses. According to various American decisions, the Commerce clause, above referred to, excludes by implication the State's power of taxation only when the goods enter "the export stream" and until then such goods form part of the general mass of property in the State subject as such to its jurisdiction to tax, and this principle is also held applicable to cases arising under the import-export clause.[31]

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[30] 1942 F C 33 (35) [AIR V 29] (F C).

[31] (1949) 93 Law Ed 1276 (1280) : 337 U S 154 (157), *Empresa Siderurgica, S. A.* v. *Merced.* (Local tax on property sold for export—Local property tax on such part of a cement plant sold for export to South America as was dismantled but had not been delivered to any carrier for export or otherwise

Thus, the "stream theory" developed under the American Constitution means that the exclusion of the State power of taxation does not become operative until the goods have actually begun to move on their outward journey.

As already stated, the Supreme Court held that this theory was inapplicable to the construction of cl. (1) (b) and that the scope of the clause cannot be confined, on the analogy of this theory, to sales and purchases which take place while the goods are actually in transit from one country to another. In this connection the Supreme Court, referring to the commerce and import-export clauses of the American Constitution, observed as follows :

> "These clauses are widely different in language, scope and purpose, and a varying body of doctrines and tests have grown around them interpreting, extending or restricting, from time to time, their operation and application in the context of the expanding American commerce and industry, and we are of opinion that not much help can be derived from them in the solution of the problems arising under ART. 286 of the Indian Constitution."

See also the observations in the undermentioned cases[32] in which the utility of American decisions about the "stream theory" in the construction of this clause, was discussed.

(n) The second proposition: Purchase for purpose of export and sale after import not covered by clause.

The next proposition settled by the Supreme Court is that a purchase by an exporter for the purpose of the export[33] as well as a sale by the importer after the goods have been imported will not be exempt from the liability to taxation, under this clause. This means

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started on its journey on the tax date is not invalid as violating Art. 1, S. 10, cl. (2).)

(1886) 29 Law Ed 715 (718) : 116 U S 517 (527), *Coe* v. *Errol.*

[32] 1955 Mad 314 (Prs. 12 & 40) [(S) AIR V 42 C 88]: ILR (1955) Mad 579 (FB), *State of Madras* v. *K. H. Chambers.*

1953 Mad 116 (125) [AIR V 40 C 36] (DB), *Govindarajulu Naidu & Co.* v. *State of Madras.*

[33] *See also the following cases in which it was held that a purchase of goods by an exporter for the purpose of export is not one which takes place in the course of the export :*

1955 Mad 314 (324) (Pr. 25) [(S) AIR V 42 C 88] : ILR (1955) Mad 579 (FB), *State of Madras* v. *K. H. Chambers.* (A purchase of goods for the purpose of export even though such purchase is effected to implement orders for the export of these goods is not "a sale or purchase in the course of export" within the meaning of the exemption in Art. 286.)

1954 Mad 937 (938) (Pr. 2) [AIR V 41 C 321] : I L R (1955) Mad 781 (DB), *Mahalakshmi Textile Mills Ltd.* v *State of Madras.*

1954 Mad 833 (837) (Pr. 12) [AIR V 41 C 281] : I L R (1955) Mad 184 : 1954 Cri L Jour 1287 (DB), *In re Guruviah Naidu & Co.*

1953 Mad 116 (124) [AIR V 40 C 36] (DB), *Govindarajulu Naidu & Co.* v. *State of Madras.* (The words "in the course of export" in Art. 286 cannot bear the same meaning as "for the purpose of export.")

that although the phrase "in the course of export or import" should not be construed in the strict etymological sense of the word 'course' so as to make the exemption under the clause applicable only to the sales and purchases which take place while the goods are actually in transit (on the analogy of the "stream theory" under the American Constitution), yet, the phrase cannot be extended so as to cover sales and purchases which do not form part of the same transaction as the export or the import, that is, to sales and purchases which are distinct from the export or import. A purchase by an exporter for the purpose of the export would only be a *preparation* for the export and would not form part of the process of export. Similarly, the sale of imported goods by an importer after they have crossed the customs frontier would not form part of the process of import. Hence, such sales and purchases cannot be regarded as taking place in the course of export or import. This was the reasoning of the majority judgment of the Supreme Court in the *second Travancore Case*[34] in which the above proposition was laid down. The Supreme Court observed as follows in the above case :

> "The phrase 'integrated activities' was used in the previous decision to denote that 'such a sale (i.e., sale which occasions the export) cannot be dissociated from the export without which it cannot be effectuated, *and the sale and the resultant export form parts of a single* transaction.' It is in that sense that the two activities—the sale and the export—were said to be integrated. A purchase for the purpose of export like production or manufacture for export, is only an act preparatory to export and cannot, in our opinion, be regarded as an act done 'in the course of the export of the goods out of the territory of India,' any more than the other two activities can be so regarded. As pointed out by a recent writer :
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> > 'From the legal point of view it is essential to distinguish the contract of sale which has its object the exportation of goods from this country from other contracts of sale relating to the same goods, but not being the direct and immediate cause for the shipment of the goods ..... When a merchant shipper in United Kingdom buys for the purpose of export goods from a manufacturer in the same country the contract of sale is a home transaction; but when he resells these goods to a buyer abroad that contract of sale has to be classified as an export transaction' : Schmitthoff —Export Trade, 2nd Edn. p. 3.
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> "This passage shows that, in view of the distinct character and quality of the two transactions, it is not correct to speak of a

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[34] 1953 S C 333 (336) (Pr. 11) [AIR V 40 C 78] : 1954 S C R 53 : I L R (1954) Trav-Co 1 (S C), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory*.

> purchase for export as an activity so integrated with the exportation that the former could be regarded as done 'in the course of' the latter. The same reasoning applies to the first sale after import which is a distinct local transaction effected after the importation of the goods into the country has been completed, and having no integral relation with it. Any attempt, therefore, to invoke the authority of the previous decision in support of the suggested extension of the protection of cl. (1) (b) to the last purchase for the purpose of export and the first sale after import on the ground of integrated activities must fail."

The following passage from the judgment of the majority (delivered by Patanjali Sastri, C. J.) may also be quoted in this connection (at p. 336 of A I R 1953 S C) :

> "What is exempted under the clause is the sale or purchase of goods taking place in the course of the import of the goods into or export of the goods out of the territory of India. It is obvious that the words 'import into' and 'export out of' in this context do not mean the article or commodity imported or exported. The reference 'to the goods' and to 'the territory of India' make it clear that the words 'export out of' and 'import into' mean the exportation out of the country and importation into the country respectively. The word 'course' etymologically denotes movement from one point to another, and the expression 'in the course of' not only implies a period of time during which the movement is in progress but postulates also a connected relation. For instance, it has been held that the words 'debts due to the bankrupt in the course of his trade' in S. 15 (5), English Bankruptcy Act, 1869, do not extend to all debts due to the bankrupt during the period of his trading but include only debts *connected with the trade* : (see *In re Pryce; Ex parte Rensburg*[35] and Williams on Bankruptcy, 16th Edn. p. 307). A sale in the course of export out of the country should similarly be understood in the context of cl. (1) (b) as meaning a sale taking place not only *during* the activities directed to the end of exportation of the goods out of the country but also *as part* of or connected with such activities. The time factor alone is not determinative. The previous decision proceeded on this view and emphasised the integral relation between the two where the contract of sale itself occasioned the export as the ground for holding that such a sale was one taking place in the course of export."

The above passage seems to require a little elucidation. The question under discussion is whether a sale to or a purchase by an exporter *for the purpose of export* can be said to be a sale or purchase "in the course of export" within the meaning of cl. (1) (b). His Lordship has stated that the word "course" etymologically denotes movement from one point to another and that the expression "in the course of" not only implies a period of time during which the movement is in progress but postulates also a connected relation. As a sale of the above description obviously takes place before the goods actually begin to move, it may be asked what is meant by saying, with reference to such sale, that it must take place not only *during* the movement of the goods but also must be connected with it.

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[35] (1877) 4 Ch D 685 : 36 L T 117.

His Lordship's observations have, however, to be understood in the context of the previous decision of the Supreme Court in the *first Travancore case*[36] in which it was held that a sale, which itself occasioned the export of goods, would be a sale which takes place in the course of the export, as such sale forms an integral part of the export.

Suppose an Indian exporter receives an order from a foreign buyer for certain goods and in order to implement such order, he purchases the goods in the local market. According to the decision in the *first Travancore case*[37] the contract of sale with the foreign buyer would be covered by cl. (1) (b) as being a sale which directly occasions the export. In that case it was observed :

> "A sale by export thus involves a series of integrated activities commencing from the *agreement of sale* with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea."

The purchase of goods in the local market, for the purpose of implementing the contract, takes place obviously *(chronologically speaking)*, *after* the contract. Under these circumstances it may be argued that the purchase takes place during the process of export, which, according to the ruling in the *first Travancore case*, begins from the contract of sale under which the goods are exported. (See in this connection the observations of Das, J., in *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory*[38] who used this very argument in support of his dissenting view.) It would seem that it is for the purpose of meeting such an argument that it has been pointed out by the learned Chief Justice that the sale or purchase in regard to which the benefit of cl. (1) (b) is claimed, must take place not only *during* the activities directed to the end of exportation of the goods but also as part of or connected with such activities and that the time factor alone is not determinative.

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[36] **36.** 1952 S C 366 (368) (Pr. 14) [AIR V 39] : 1952 S C R 1112 : ILR (1953) Trav-Co 337 (S C), *State of Travancore-Cochin* v. *Bombay Co. Ltd.*

[37] **37.** 1952 S C 366 (367) (Pr. 10) [AIR V 39] : 1952 S C R 1112 : I L R (1953) Trav-Co 337 (S C), *State of Travancore-Cochin* v. *Bombay Co. Ltd.*

[38] **38.** 1953 S C 333 (348) (Pr. 52) [AIR V 40 C 78] : 1954 S C R 53 ; I L R (1954) Trav-Co 1 (S C).

(o) Argument of double taxation met.

In the above case, it was argued that the refusal to extend the exemption under the clause to purchases for the purpose of export and to the first sales by the importer would mean double taxation of the exports and the imports, once in the form of the sales-tax and again in the form of export and import duty. It was contended that such double taxation would defeat the purpose of the clause. The Supreme Court rejected the argument and pointed out that there was no question of double taxation, inasmuch as the taxes would not be levied on the *same* transaction, because the purchases and the sales in such cases would be *distinct* from the export and the import. It would be sufficient, in order to avoid double taxation of foreign trade, that the sale under which the export takes place and the purchase under which the import takes place are exempted from sales-tax.

(p) Practical difficulties in extending exemption.

The Supreme Court also pointed out the practical difficulties in giving effect to the exemption if it should be extended to purchases for the purpose of export and to first sales by the importer after the goods have been imported.

(q) Commercial practice as to export-import trade.

It was argued before the Supreme Court that a large proportion of the export trade of the country was carried on by merchant houses who purchased goods from the producers and manufacturers to resell them to buyers abroad by means of contracts concluded with them. Similarly (it was argued) with regard to import trade, large import houses imported machinery and consumer goods wholesale and sold them to retail dealers or in some cases to the customers direct. In view of this general commercial back-ground, it was argued, that it was not likely that the Constitution-makers would have intended that such sales and purchases by the import and export merchants of the country should be liable to taxation by States as such taxation would adversely affect the foreign trade of the country. The Supreme Court declined to attach much importance to such considerations, which, it said, were largely based on speculation and were not of much assistance in construing the scope of a specific constitutional provision seeking to restrict the power of State taxation.

(r) Balancing of conflicting objectives.

The Supreme Court also pointed out that the object of fostering the foreign trade of the country should be balanced against the object of securing adequate finances to States for carrying on their administration and the Court had to decide how far the Constitution-makers intended to go in regard to the fostering of foreign trade.

(s) The third proposition: Sales and purchases while goods are actually in transit

The third proposition, settled by the Supreme Court, is that sales or purchases, effected in the State by transfer of shipping documents, while the goods are still in transit, take place "in the course of" imports or exports. This proposition seems to be self-evident, as even according to the narrowest construction of the words "in the course of export or import" such sales and purchases clearly take place in the course of export and import. But in the *second Travancore case*,[39] it seems to have been argued that the clause will only apply to the sales which occasioned the export and to the purchases which occasioned the import, and not to any other sales and purchases. The Supreme Court negatived this contention and held that sales and purchases by transfer of shipping documents while the goods were in actual transit from one country to another would also be covered by the clause.[40]

(t) Dissenting view of S. R. Das, J., regarding second proposition

S. R. Das, J., who was a member of the Bench in the *second Travancore case*,[41] strongly dissented from the view of the majority as to the scope and meaning of cl. (1) (b). According to him, the constitutional purpose of the provision, namely, the fostering of foreign trade by protecting it from excessive taxation would be defeated unless the exemption under cl. (1) (b) was held to extend to purchases made by an exporter for the purpose of export and to sales by an importer after the goods have been imported. He also held that having regard to the commercial practice in connection with the export and import trade in India, such purchases and sales must be deemed to form part of the course of export and import.

(u) Clause does not cover series of transactions preceding export or following import

The view that the clause does not apply to purchases by the exporter for the purpose of export and to sales by the importer after import necessarily implies that the broad view of the High Court of Travancore-Cochin[42] in the *first Travancore case*,[43] namely, that the clause would cover the whole series of transactions which necessarily precede the export or follow import of goods is not correct.

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[39] 1953 S C 333 (338) (Prs. 15, 16) [AIR V 40 C 78] : 1954 S C R 53 : I L R (1954) Trav-Co 1 (S C), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory.*

[40] 1955 Mad 722 (725) (Pr 15) [(S) AIR V 42 C 232] (DB), *Gandhi Sons* v. *State of Madras.* (C. and F. contracts for sale of goods — Goods to be exported from Cochin Harbour to foreign countries by assessee on account and risk of buyers—Appropriation of goods by seller by packing, etc.—Nevertheless property in goods did not pass till the bills of lading were presented to buyer, or at any rate till goods were put on board—Hence sale took place in course of export.)

[41] 1953 S C 333 (352) (Pr 59) [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory.*

[42] 1952 Trav-Co 83 (84) [AIR V 39 C 35] (DB), *Bombay Company Ltd.* v. *State.*

[43] 1952 S C 366 [AIR V 39] : 1952 S C R 1112 : ILR (1953) Trav-Co. 337 (SC), *State of Travancore-Cochin* v. *Bombay Co. Ltd.*

(v) Purchase for manufacture and export — Clause not applicable.

Where goods are purchased in the State by a person and then after being put through certain processes are exported by him to foreign countries, the purchase will not be exempt under this clause, where the goods exported are commercially not the same kind of articles as those purchased. In such a case, apart from the fact that a purchase by an exporter for the purpose of export is not covered by the exemption under this clause, such exemption will not apply on another ground also, namely, that the goods exported are commercially different from those purchased and, therefore, even assuming that purchase of goods for the purpose of export will be a purchase in the course of export, the rule will not apply as the goods purchased and the goods exported are not identical. Thus, in the *second Travancore case*,[44] raw cashewnuts were purchased by the assessee and after being roasted and shelled, the cashewnut kernels were exported to foreign countries. S. R. Das, J., held the view that a purchase by an exporter for the purpose of export would be covered by the exemption under this clause. But he held that in the instant case this rule would not be applicable as the goods purchased were commercially different from those exported.

(w) Tax on purchase not bad though tax is imposed only on goods being exported.

Where what is taxed is a purchase by an exporter of goods for the purpose of export, the imposition of the tax does not contravene this clause merely because under the rules the liability to pay the tax arises on the export of the goods.[45]

14. Sales and purchases in course of export or import — Liability to tax—Illustrative cases.—(i) A, in Travancore-Cochin State, sells to B in London goods on c.i.f. or f.o.b. terms and accordingly the goods are shipped from a port in Travancore-Cochin State to England. The sale is exempt from tax although the property in the goods passes to the foreign buyer in the State of Travancore-Cochin. It is not necessary to be entitled to exemption under cl. (1) (b) that the sale must have taken place after the export journey has begun and while the goods are on the high seas.[1]

(ii) A is a dealer in cashewnuts in the State of Travancore-Cochin. His business consists in importing raw cashewnuts from abroad and the neighbouring districts in the State of Madras in addition to the purchases made in the local market, and after converting them by means of certain processes into edible kernels exporting the kernels to other countries, mainly, America. The oil pressed from the shells removed from the cashewnuts is also exported.

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[44] 1953 S C 333 [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory*.

[45] 1955 Mad 314 (321) [(S) AIR V 42 C 88] : ILR (1955) Mad 579 (FB), *State of Madras* v. *K. H. Chambers*. (Overruling AIR 1954 Mad 934.)

Article 286 — Note 14

[1] 1952 S C 366 (368) [AIR V 39] : 1952 S C R 1112 : ILR (1953) Trav-Co 337 (SC), *State of Travancore-Cochin* v. *Bombay Co. Ltd.*

In this case, the sale to the foreign buyers, under which the edible cashew kernels and the oil pressed from the cashewnut shells are exported, will be exempt from the liability to State taxation.[2] Similarly, the purchases of raw cashewnuts under which they are imported from abroad will also be exempt from taxation.[3]

The purchases of raw cashewnuts from the neighbouring districts in the State of Madras, would be liable to taxation under the Travancore-Cochin Sales Tax Law, where the purchases are made from dealers in the Madras State who deliver the goods in the Travancore State (if and when Parliament lifts the ban under cl. (2)).[4] (See NOTE 3.) Wheret he purchases are made by A by sending his own servants to the Madras State who make purchases and take delivery there and then despatch the goods to Travancore State, the purchases will not be liable to tax under Travancore Sales Tax Law but only under the Madras Sales Tax Law, because in such a case, the sale will be completely outside the Travancore-Cochin State.[5] (See NOTE 3.)

The liability to tax under the Travancore State Sales Tax Law and the Madras State Sales Tax Law in the above two cases cannot be avoided on the ground that the purchases of the cashewnuts in the Madras State are made in the course of their export to foreign countries, because purchases made for the purpose of export are not purchases in the course of export, according to the ruling of the Supreme Court in the *second Travancore case.*[6] There is also another reason for denying to such purchases the benefit of the exemption under cl. (1) (b), namely, that the article exported is commercially different from the article purchased by the exporter.

As regards the cashewnuts purchased in the local market, such purchases are liable to taxation under the sales tax law of Travancore-Cochin and are not entitled to exemption under cl. (1) (b), for the two reasons mentioned above, namely, (a) purchases for purpose of export are not purchases in the course of export according to the *second Travancore case,*[7] and (b) the article exported is not commercially the same as the article purchased.

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[2] 1952 S C 366 (368) [AIR V 39] : 1952 S C R 1112 : ILR (1953) Trav-Co 337 (SC), *State of Travancore-Cochin* v. *Bombay Co. Ltd.* (Export sale of tea, coir products and lemongrass oil.)

[3] 1953 S C 333 (339) (Pr 21) [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC), *State of Travancore-Cochin* v. *Shamugha Vilas Cashewnut Factory.*

1952 S C 366 (368) [AIR V 39] : 1952 S C R 1112 : ILR (1953) Trav-Co 337 (SC), *State of Travancore-Cochin* v. *Bombay Co. Ltd.*

[4] 1953 S C 252 (258) (Pr 16) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

[5] 1953 S C 252 (258) (Pr 16) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

[6] 1953 S C 333 (338) (Pr 16) [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory.*

(iii) A, a dealer in cashew-nuts in Travancore-Cochin State, imports cashew-nuts from Africa for converting them into kernels and exporting the kernels to America and other countries. The procedure followed in regard to import from Africa is as follows: The orders are not placed with the African sellers directly, but through intermediaries in Bombay, who act as agents of A and arrange for the purchases on behalf of A, although the goods are shipped directly to Travancore port. The Bombay agents are sent the shipping documents which they take delivery of through banks and then forward to A in Travancore. In this case, as the Bombay agents are not acting as principals but only as agents on A's behalf and as there is privity between A and the African sellers, the transaction is an import-purchase by A and as such, in spite of the Bombay intermediaries, is not taxable by the Travancore State.[8]

But suppose in the above instance, the Bombay party is acting as *principal* and although the goods are shipped directly from Africa to Travancore, the Bombay party is the consignee of the goods which he disposes of to different buyers in Travancore including A. The purchase by A from the Bombay party is not an import-purchase and hence not entitled to exemption under cl. (1) (b). The fact that the purchases are made for the purpose of export will not also be a ground for exemption under cl. (1) (b).[9]

(iv) A in Bombay ships goods to himself or his agent in London and while the goods are on the high seas, transfers the goods by delivery of the shipping documents to B in Bombay. Here, both parties to the sale are in Bombay and it is not a case in which the sale takes place between two persons one of whom is in one country and the other in another country. Nevertheless, this is a sale which takes place in the course of export and as such entitled to the exemption under cl. (1) (b).[10]

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[7] 1953 S C 333 (338) (Pr 16) [AIR V 40 C 78] : 1954 S C R 53: ILR (1954) Trav-Co 1 (SC), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory.*

[8] 1953 S C 333 (339) [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory.*

[9] 1953 S C 333 (339) [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory.*

[10] 1953 S C 333 (347) [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC), *State of Travancore-Cochin v. Shanmugha Vilas Cashewnut Factory.* [*See* 1953 Mad 116 (125) [AIR V 40 C 36] (DB), *Govindarajulu Naidu & Co.* v. *State of Madras.* (A in Madras consigns goods to his own order or control

(v) An Indian importer places an order or indent with an overseas merchant for the supply of a large quantity of goods. The goods are shipped and the shipping documents are sent by air mail and presented to the Indian importer by the overseas merchant through his bank. The Indian importer receives the shipping documents against payment. He then transfers the goods to another merchant by transfer and delivery of the shipping documents. Although this latter transaction may take place wholly in India between persons both of whom are in India itself, it is a sale which takes place in the course of import and as such exempt under cl. (1) (b) from liability to sales-tax.[11]

(vi) A in Bombay receives an order from an overseas merchant for certain goods. In order to implement the order, A purchases the goods from various persons in the Bombay State and then exports them. The sales and purchases are not entitled to exemption and cannot be treated as taking place in the course of export.

(vii) A, who is an export merchant in Bombay, purchases goods in the local market in anticipation of orders from abroad and then on receipt of such orders, exports such goods. The purchases made by A in the Bombay State for the purpose of export are not exempt from taxation by the Bombay State.

(viii) A, who is a wholesale importer of goods in Bombay, receives orders from various merchants in Bombay and imports the goods from abroad. After the goods are received, he sells them to the various merchants who have placed orders. The sales to these merchants cannot be said to take place in the course of the imports and are not exempt from liability to taxation by the Bombay State.

(ix) A, an import merchant in Bombay, in anticipation of getting orders for certain goods from local merchants, imports the goods from abroad and sells them to wholesale and retail dealers. The sales will not be sales taking place in the course of import, so as to be exempt from liability to taxation.

(x) A, an importer, imports goods which he sells to the consumers directly. The sales to the consumers are not exempt under cl. (1) (b) from liability to taxation.

(xi) A, who is an exporter of goods to foreign countries, buys them in the local market for the purpose of export and then sells a

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in Calcutta and while the goods are actually in transit, a transaction of sale is concluded in Madras by transfer of the relative documents of title — Madras State cannot tax the sale as it takes place in course of inter-State commerce.)]

[11] 1953 S C 338 (347) [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory*.

portion of them to B, another exporter of the same place, who exports the goods afterwards. The sale by A to B is not exempt.[12]

(xii) A, a yarn merchant, was assessed to sales-tax on the sales of the yarn which he effected to an exporter. Under the Cotton Textiles (Export Control) Order, 1949, he was obliged to retain and sell the yarn for export. As A had himself no export licence he had to sell the yarn to another merchant who had such licence and who exported the yarn. It was held that still the sales by A were not exempt from sales-tax as they were sales only for the purpose of exports and not sales in the course of exports.[13]

(xiii) A, a hide and skin merchant of Madras, sends his representatives to Dacca in Pakistan. The representatives purchase raw hides and skins in Dacca on behalf of A, pay the price, take delivery and consign the goods from there to Madras. The purchase of the hides and skins in Dacca by A's representatives and their being sent to Madras do not constitute a purchase in the course of import of the goods into India. Such a purchase is not an import purchase[14] within the rule laid down by the Supreme Court in the *first Travancore case*,[15] because the import-purchase there contemplated is a transaction between persons dealing with each other from different countries, whereas in the present case, the dealing is complete in Dacca and the import is made only by A's own representatives to him.[16]

In this connection, illustrations (iv) and (v) above may be compared with the present illustration. It will be seen that in those illustrations, the sale takes place between parties, both of whom are in India at the time of the sale. Nevertheless, the sale is held to be one which takes place in the course of export (illustration (iv)) and import (illustration (v)). But in both the illustrations the sale takes place while the goods are actually in transit from one country to another. In such cases, not only do the sales take place literally in the course of the export or import of the goods, as the case may be, but they are regarded by commercial practice as normal methods of import and export trade.

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12. 1953 S C 333 (338) (Pr 16) [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory.*

13. 1954 Mad 937 (938) (Pr 2) [AIR V 41 C 321] : ILR (1955) Mad 781 (DB), *Mahalakshmi Textile Mills Ltd.* v. *State of Madras.*

14. 1953 Mad 116 (126) (Pr 26) [AIR V 40 C 367] (DB), *Govindarajulu Naidu & Co.* v. *State of Madras.*

15. 1952 S C 366 (367, 368) (Pr 10) [AIR V 39] : 1952 S C R 1112 : ILR (1953) Trav-Co 337 (SC), *State of Travancore-Cochin* v. *Bombay Co. Ltd.*

16. 1953 Mad 116 (125, 126) (Pr 26) [AIR V 40 C 36] (DB), *Govindarajulu Naidu & Co.* v. *State of Madras.*

In the case contemplated by the present illustration, however, although clause (1) (b) does not apply to the sale, the sale is not taxable by Madras State because the sale takes place outside the Madras State and, as such, is exempt under cl. (1) (a) from taxation by Madras State.[17]

(xiv) A, a merchant in Nagpur, imports goods from London. After the goods have reached Bombay and while they are in transit between Bombay and Nagpur the Nagpur merchant sells them, by transfer of the relative documents, to another person. Will this be a sale in the course of import ?

It seems to have been assumed in the *second Travancore case*[18] that, in computing the period of import or export, although the process of export or import ordinarily begins and ends "at water's edge", the period of journey of the goods from the port to the place of importer or his representative in the case of import, or to the port from the place of the exporter or his representative from the place of the export may be added to the period of actual voyage on the high seas. It seems doubtful whether such extension of the meaning of the words "the course of export or import" in cl. (1) (b) is permissible because the clause speaks of "the import into and export out of the territory of India". Once the goods have reached the shores of India, it may be questioned whether their further journey from the port to the interior place can be regarded as forming part of the import into the territory of India.

(xv) The undermentioned decision[19] affords an instance of a sale of goods on c. and f. terms which was held to have taken place in the course of export as the title to the goods passed to the buyer only after the goods had passed the customs frontier and had been placed on board the ship.

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[17] 1953 Mad 116 (126) (Pr 26) [AIR V 40 C 36] (DB), *Govindarajulu Naidu & Co.* v. *State of Madras.*

[18] 1953 S C 333 [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory.*

[19] 1955 Mad 722 (728) [(S) AIR V 42 C 232] (DB), *Gandhi Sons* v. *State of Madras.* (The course of the export out of or of the import into the territory of India does not commence or terminate until the goods cross the customs frontier: AIR 1953 S C 333 (SC), *Foll.* C. and F. contracts for the sale of goods were entered into by the assessee with merchants in Bombay. The goods were to be exported from Cochin harbour to foreign countries by the assessee on account and risk of the buyers. There was appropriation of goods to the contract by reason of packing the goods in the gunny bags and marking them with the buyers' initials with the assent of the buyers. The appropriation, however, was not unconditional because the seller had further duties in connection with the goods which included loading them on board the ship and obtaining proper bills of lading for conveyance of the goods to the contracted destination and the seller in his turn was entitled to payment in exchange for these shipping documents. *Held,* that the property in the goods did not pass to the buyers until the relevant bills of lading were presented to the buyers or in any event at least not until the goods were put on board the vessels at the harbour. In this view, as the goods were booked and had started on their journey to a foreign destination at the moment when the title in the goods passed to the buyer, there was

(xvi) Where merchants in Bombay who entered into their respective contracts with assessees in Madras were themselves the purchasers (whether the purchases were on their own behalf or on behalf of undisclosed foreign principals) and there was no privity between the assessees and the foreign principals, the sale will not be an 'export sale' as a sale can be said to occasion an export only when there is privity between the local seller and the foreign buyer.[20]

15. Retrospective operation of the article. — The principle that statutes will be presumed to be prospective and not retrospective unless a different intention is conveyed by the statute expressly or by necessary implication applies, as has been seen in Preamble, NOTE 9, to a constitutional enactment as it applies to any other Act. Hence, this article will not affect the liability to taxation that has already accrued before the coming into force of the Constitution under the sales-tax legislation of any province, as there is nothing in the article to indicate that it is retrospective[1].

But where the question is as to assessability to tax for a period subsequent to the coming into force of the Constitution, the provisions of this article will apply[2].

"a sale in the course of export" entitling the assessee to the constitutional exemption under Art. 286 (1) (b)).

[20] 1955 Mad 722 (725) (Pr 15) [(S) AIR V 42 C 232] (DB), *Gandhi Sons* v. *State of Madras.*

Article 286 — Note 15

[1] 1955 Nag 99 (102, 103) (Pr 14) [(S) AIR V 42 C 23]: ILR (1955) Nag 137 (DB), *Nemkumar* v. *Commissioner of Sales Tax, M. P.* (Question of liability to tax for the period from 1-6-1947 to 12-11-1947—This liability was determined and tax recovered before Constitution came into force — Validity of the Sales Tax Act in view of Art. 286 does not arise.)

1954 Mad 1030 (1038) (Pr 29) [AIR V 41 C 360], *India Coffee and Tea Distributing Co. Ltd.* v. *State of Madras.* (Assessments made in respect of period prior to 26-1-1950 not affected by Art. 286.)

[*See* 1953 S C 274 (277) (Pr 9) [AIR V 40 C 63] : 1953 Cri L Jour 1105 : 1953 S C R 677 (SC), *Poppatlal Shah* v. *State of Madras.* (In this case, question was as to the liability for sales-tax under Madras General Sales Tax Act (9 of 1939) in respect of a period prior to the Constitution — It was held by the Supreme Court on the construction of the Act that it did not apply to sales under which property in goods passed in another Province.)]

[2] 1953 S C 333 (334, 339) (Pr 3, 23) [AIR V 40 C 78) : 1954 S C R 53 : ILR (1954) Trav-Co 1 (S C), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory.* (Travancore-Cochin General Sales Tax Act 18/1124 M E— Liability from 26-1-1950 to 29-5-1950 the end of the account year—Avoided as coming under cl. (1) (b).)

In this connection, the question may be raised as to whether the validity of pre-Constitution sales-tax legislation can be challenged on the ground of such legislation being inconsistent with the provisions of this article. This question has to be answered in the affirmative, although the liability to taxation for a period prior to the coming into force of the Constitution will not be affected by the article.

The article says that "no law of a State" shall impose or authorise the imposition of a tax on the sale or purchase of goods under the circumstances mentioned in the article. The expression "law of a State" is not equivalent to "law made by the Legislature of a State", which expression occurs in cl. (3) of the article. "Law of a State" is wide enough to include the existing laws which are in force in each State at the commencement of the Constitution, as well as future laws that may be made by the Legislature of a State[3]. Hence, the prohibitions and restrictions, imposed by the article, will apply to the pre-Constitution sales-tax legislation of the different States as well as any sales-tax legislation that may be passed by State Legislatures after the coming into force of the Constitution.[4]

Thus, a provision in the Sales-tax Act of a Province that the sale will be deemed to have taken place in the Province if the goods were actually in the Province or were produced or found in the Province, wherever the contract of sale was made, would mean that even though the goods may be actually delivered for consumption in another Province the sale must be deemed to have taken place in the Province in which the goods exist or are produced or are found. Such a provision would be directly contrary to cl. (1) (a) read with the Explanation as according to that provision, the sale must be deemed, for taxation purposes, to take place in the State in which the goods are actually delivered for consumption and *outside all other States*. Hence, a provision of the above type would be void after the coming into force of the Constitution.[5]

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[3] 1955 All 99 (103, 104) (Pr 7) [(S) AIR V 42 C 35], *Kanpur Oil Mills* v. *Judge (Appeals) Sales Tax.* (Wherever, in the Constitution, it was intended that the ban should be only on future laws, the language used has specifically dealt with the making of a law by a State and the use of the word "made" in that connection for one form or the other has been brought in to make it clear that such provisions of the Constitution would govern only future laws. Where the words used are 'law of a State' these words are comprehensive enough to cover existing laws as well as laws made after the commencement of the Constitution.)

[4] 1955 All 99 (103, 104) (Pr 7) [(S) AIR V 42 C 35], *Kanpur Oil Mills* v. *Judge (Appeals) Sales Tax.*

[5] 1954 S C 403 (405) (Pr 7) [AIR V 41 C 97]: 1954 S C R 1122 (SC), *Himmatlal Harilal Mehta* v. *State of Madhya Pradesh.* (Validity of Explanation II to S. 2 (g), C. P. and Berar Sales Tax Act (II of 1947, as amended by Act XV of 1949)—The correctness of the view of the High Court in AIR 1952 Nag 378 that

But, so far as the ban under cl. (2) on the taxation of sales and purchases which take place in course of inter-State trade and commerce is concerned, the Proviso to the clause creates an exception in regard to assessment to sales-tax under pre-Constitution legislation. Under the Proviso to cl. (2) it has been enacted that the imposition of tax under pre-Constitution sales-tax legislation may continue, notwithstanding the prohibition under cl. (2), until 31st March 1951, if the President authorises the imposition of such tax. Under this Proviso, the President has issued Sales-Tax Continuance Order, 1950 (C. O. No. 7 of 1950). It must be noted that the President's Order can only validate the imposition of tax contrary to the provisions of cl. (2). Where the imposition of tax is contrary to the provisions of cl. (1), such imposition cannot be validated or authorised by the President's Order under Proviso to cl. (2)[6]. See also NOTE 10.

(a) Sales-tax Laws Validation Act, 1956.

It has been seen in NOTE 3 that the Supreme Court has, in its latest decision on the point (*Bengal Immunity Co.* v. *State of Bihar*[7]), held, overruling its previous view in *State of Bombay* v. *United Motors India Ltd.*,[8] that until and unless Parliament by law provides otherwise, a State cannot tax a sale or purchase which takes place in the course of inter-State trade or commerce, although it may be covered by cl. (1) (a) Explanation, and hence, may be deemed as taking place within the 'delivery' State. The decision in the *Bengal Immunity Co.'s case*[9] was given on 6th September 1955. The Sales-Tax Continuance Order, 1950 (C. O. No. 7 of 1950), as seen above, validated the levy of tax on inter-State sales, till 31st March 1951. In order to validate the levy of tax on sales and purchases in the course of inter-State trade or commerce that took place between the 1st April 1951 and 6th September 1955, the President promulgated

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the new Explanation II to S. 2(g) was *ultra vires* the State Legislature and that the mere production of goods was not enough to make the tax payable unless the goods were appropriated to a particular contract cannot be questioned by reason of the decision in AIR 1953 S C 252 (SC).)

1952 Nag 378 (387) (Pr 52) [AIR V 39] : ILR (1953) Nag 332 (DB), *Shriram Gulabdas* v. *Board of Revenue.*

[*See also* 1955 All 99 (104) (Pr 7) [(S) AIR V 42 C 35], *Kanpur Oil Mills* v. *Judge (Appeals) Sales Tax.* (The U. P. Sales Tax Act continues to be in force in the State of Uttar Pradesh after the commencement of the Constitution only to the extent to which it did not contravene any of the provisions of the Constitution. The provision, which permits the State of Uttar Pradesh to tax sales which under clause (1) (a) of Art. 286 must be deemed to take place outside the State of Uttar Pradesh, has become void as a consequence.)]

[6] 1955 All 99 (103) (Pr 6) [(S) AIR V 42 C 35], *Kanpur Oil Mills* v. *Judge (Appeals) Sales Tax.*

[7] 1955 S C 661 (687) (Prs 4, 8) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC).

[8] 1953 S C 252 [AIR V 40 C 62] : 1953 S C R 1069 (S C).

[9] 1955 S C 661 [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

the Sales-tax Validation Ordinance, 1956, which was subsequently re-enacted as the Sales-tax Laws Validation Act (7 of 1956), which runs as follows:

> "An Act to validate laws of States imposing, or authorising the imposition of, taxes on the sale or purchase of goods in the course of inter-State trade or commerce.
>
> Be it enacted by Parliament in the Seventh year of the Republic of India as follows:
>
> 1. This Act may be called the Sales-tax Laws Validation Act, 1956.
>
> 2. Notwithstanding any judgment, decree or order of any Court, no law of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any goods where such sale or purchase took place in the course of inter-State trade or commerce during the period between the 1st day of April, 1951 and the 6th day of September, 1955, shall be deemed to be invalid or ever to have been invalid merely by reason of the fact that such sale or purchase took place in the course of inter-State trade or commerce; and all such taxes levied or collected or purporting to have been levied or collected during the aforesaid period shall be deemed always to have been validly levied or collected in accordance with law.
>
> *Explanation.*—In this section, 'law of a State' in relation to a State specified in Part C of the First Schedule to the Constitution, means any law made by the Legislative Assembly, if any, of that State or extended to that State by a notification issued under section 2 of the Part C States (Laws) Act, 1950.
>
> 3. The Sales-tax Laws Validation Ordinance, 1956, is hereby repealed."

16. Proviso to cl. (2).—See NOTES 10 and 15.

17. Essential goods — Exemption as to—Clause (3). — Clause (3) contains a qualified exemption from sales-tax in regard to certain sales and purchases. The exemption is to the effect that a sales-tax law of a State which seeks to tax the sales and purchases mentioned in the clause will require the *assent of the President* for its validity. It will be noted that the prohibitions contained in cls. (1) and (2) are absolute and unqualified.

This clause deals with sales and purchases of *essential commodities* and in regard to such sales and purchases enacts that the imposition of a sales-tax on them will require the President's assent for its validity.

But the clause has only a very restricted application. In the first place it only applies to the sales and purchases of the commodities which have been *declared by Parliament* by law to be essential for the life of the community. It is not left to the Courts to determine whether a particular commodity is essential for the life of the community. Hence, the first condition for the applicability of the clause is the existence of a Parliamentary enactment declaring certain commodities to be essential for the life of the community.[1]

The second condition is that the sales-tax legislation must be one passed after the commencement of the Constitution. Hence, the clause does not apply to the sales-tax laws of the various Provinces which had already been passed before the commencement of the Constitution.

It is also necessary that the sales-tax legislation must be one passed after the enactment of the Parliamentary law declaring certain commodities to be essential for the life of the community.

As stated above, the first condition for the applicability of the clause is the existence of an enactment by Parliament declaring certain commodities to be essential for the life of the community. The Parliament has enacted, in pursuance of this clause, the Essential Goods (Declaration and Regulation of Tax on Sale or Purchase) Act, 52 of 1952, declaring certain commodities, which are specified in the Schedule to the Act, to be essential for the life of the community. The Act came into force on 9th August, 1952.

The Essential Supplies (Temporary Powers) Act, 1946, cannot be regarded as a law by which any commodities are "declared to be essential for the life of the community". Apart from the fact that it is not an enactment passed by Parliament, although it is a Central Act, the Act does not declare any commodities to be "essential for the life of the community". The Act only provides for the continuance, during a limited period, of powers to control the production, supply and distribution of, and trade and commerce in, certain commodities which, for the purpose of the Act, are defined therein as "essential commodities". Hence, even in those cases in which the Act has been extended to a Part B State after the commencement of the Constitution and it is arguable that it is a Parliamentary enactment on that basis, it cannot be treated as an Act declaring any commodity as essential for the life of the community.[2]

Article 286 — Note 17

[1] 1952 Hyd 191 (192) (Pr 5) [A I R V 39] : ILR (1952) Hyd 757 (DB), *Sharfaji Rao* v. *Commissioner of Sales Tax.*

[2] 1954 Hyd 94 (94, 95) (Pr 4) [AIR V 41 C 34] (DB), *Ganapathy Iyer M. A.* v. *Hyderabad State.* (Exemption under Sales Tax should be strictly construed and cannot be extended—Analogical principles cannot be invoked for claiming exemption from taxation where such exemption is not specifically provided for.)
1955 Trav-Co 18 (Pr 3) [AIR V 42 C 10], *Cheriyan Kunju* v. *Travancore-Cochin State.* (A definition clause like S. 2 of the Central Act 24 of 1946 is not the same thing as the declaration contemplated by Art. 286 (3) of the Constitution.)

As already stated, the clause contemplates an Act passed by *Parliament* and a pre-Constitution Central law (should there be one) will not be sufficient for the purpose of the clause.

It has already been remarked that the clause only applies to a law made by the Legislature of a State *after the commencement of the Constitution* and not to the various Provincial sales-tax laws, which were already in force at the commencement of the Constitution. Hence, the clause does not in any way affect the validity of pre-Constitution Provincial laws even though they may seek to impose taxes on the sale or purchase of commodities declared to be essential for the life of the community by Act 52 of 1952, above referred to, or by any other Parliamentary enactment that may be passed.[3] The words "law made by the Legislature of a State" clearly contemplate a law made by the Legislature of a State after the Constitution, inasmuch as there were no "States" before the Constitution, but only "Provinces".[4] Further, the clause clearly contemplates a law which can be, but has not been, reserved for the consideration of the President and has not received his assent. This provision clearly points to a post-Constitution law, for there can be no question of an existing law continued by ART. 372 being reserved for the consideration of the President for receiving his assent.[5]

In order that this clause may apply, it is necessary not only that the sales-tax legislation must be one passed after the commencement of the Constitution but also that such legislation must be passed after the enactment by the Parliament of the law declaring certain commodities to be essential for the life of the community. Hence, even a post-Constitution sales-tax law passed *before* 9th August, 1952, which was the date on which the Essential Goods (Declaration and Regulation of Tax on Sale or Purchase) Act, 1952, came into force, cannot be called in question under this clause.[6] This is

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[3] 1954 S C 311 (312) (Pr 2) [AIR V 41 C 73] : 1954 S C R 955 (SC). *Soma Singh* v. *State of Pepsu.* (Pepsu General Sales Tax Ordinance 33 of 2006 not affected by cl. (3).)

1955 N U C (Mad) 675 [AIR V 42] (DB), *Sree Radha Krishna Groundnut Oil Mill* v. *State of Madras.* (Clause (3) will not apply to Madras General Sales Tax Act.)

[4] 1954 S C 311 (312) [AIR V 41 C 73] : 1954 S C R 955 (SC), *Soma Singh* v. *State of Pepsu.*

[5] 1954 S C 311 (312) [AIR V 41 C 73] : 1954 S C R 955 (SC), *Soma Singh* v. *State of Pepsu.*

[6] 1954 S C 311 (312) (Pr 2) [AIR V 41 C 73] : 1954 S C R 955 (SC), *Soma Singh* v. *State of Pepsu.*

1955 N U C (Mad) 675 [AIR V 42] (DB). *Radha Krishna Groundnut Oil Mill* v. *State of Madras.*

1954 Hyd 50 (52) (Prs 8, 10) [AIR V 41 C 20] : ILR (1954) Hyd 76 (DB), *Firm of Soma Rajaiah* v. *Sales Tax Officer Secunderabad.* (Contention that the implied in the language of the clause, which refers to a law being made by the Legislature of a State with reference to goods which *have been* declared to be essential for the life of the community by Act of Parliament.[7]

Section 3 of the Essential Goods (Declaration and Regulation of Tax on Sale or Purchase) Act, 1952, expressly provides that "no law made after the commencement of the Act by the Legislature of a State imposing or authorising the imposition of a tax on the sale or purchase of any goods declared by the Act to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent."[8] This section is quite in line with cl. (3) of this article and there is nothing inconsistent with clause (3) in the section being confined to laws passed after the commencement of Act 52 of 1952.[9]

(a) Introductory : Grounds of attack classified.

18. Validity of sales-tax laws. — Sales-tax legislation, like legistation on other subjects, can be impugned on four grounds :

(i) on the ground that the matter legislated upon does not fall within the legislative jurisdiction of the particular Legislature which has passed the law;

(ii) on the ground of extra-territoriality;

(iii) on the ground that the legislation contravenes the provisions of the Constitution as to Fundamental Rights;

(iv) on the ground of the infringement of any other provision of the Constitution.[1]

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enactment of a statute taxing specific commodities immediately before the enforcement of the Act declaring them essential for the life of the community is a colourable exercise of legislative power — Contention rejected on the ground that the State Legislature had power under Sch. VII, List II, Item 54 and that in such cases question of colourable legislation cannot arise : A I R 1953 S C 375 (SC), Rel. on—Hyderabad General Sales Tax Act (14 of 1950) as amended in 1952 held not open to challenge under cl. (3).)

[7] 1955 N U C (Mad) 675 [AIR V 42] (DB), *Radhakrishna Groundnut Oil Mill* v. *State of Madras.* (The ban under Art. 286 (3) will fall only *after* Parliament declares by law any goods as essential for the life of the community.)

[8] 1954 S C 311 (312) [AIR V 41 C 73] : 1954 S C R 955 (SC), *Soma Singh* v. *State of Pepsu.* (Pepsu General Sales Tax Ordinance 33 of 2006 not affected by Cl. (3).)

1955 Trav Co 18 (18) (Prs 2, 9) [A I R V 42 C 10], *Cheriyan Kunju* v. *Travancore.Cochin State.*

[9] 1954 S C 311 (312) (Pr 2) [AIR V 41 C 73] : 1954 S C R 955 (SC), *Soma Singh* v. *State of Pepsu.*

Article 286 — Note 18

[1] *See* 1953 Mad 105 (107, 108) (Pr 3) [AIR V 40 C 35] : 1953 Cri L Jour 277 (DB), *Syed Mohamed & Co.* v. *State of Madras.* (This case illustrates the grounds on which a Sales Tax Act may be impeached.)

1953 Mad 116 (119) [AIR V 40 C 36] (DB), *Govindarajulu Naidu & Co.* v. *State of Madras.* (Do.)

These grounds may be considered more fully now.

(b) Absence of legislative power: Relevant legislative entry.

Both under the Government of India Act, 1935, and under this Constitution, sales-tax is an exclusively Provincial subject. The relevant entry in the Government of India Act was SCH. VII, LIST 2, Item 48, and under this Constitution, the relevant entry is SCH. VII, LIST 2, Entry 54.

(c) Whether Pre-Constitution Acts taxing purchases were intra vires.

The entry in the Government of India Act was as follows: "Taxes on the sale of goods and on advertisements."

The question has arisen whether this entry would cover legislation imposing or authorising the imposition of taxes on purchases, and it has been held that the entry would cover such legislation.[2] In this connection, the following observations of the Madras High Court in *Syed Mohamed and Co.* v. *State of Madras*[3] may be quoted:

> "The words 'sale of goods' import in their ordinary sense a transaction which results in change of ownership from one person to another. That must, by its very nature, be a bilateral transaction, with a seller on the one hand and a purchaser on the other. It is only when there is a contract to which both are parties that there can be a sale. A power to tax sale of goods is, therefore, in reality a power to tax the transaction and the power to tax the transaction carries with it the power to tax either party thereto."

The legislative entry under the present Constitution (SCH. VII, LIST 2, Entry 54) puts the matter beyond doubt because it runs: "Taxes on the sale or *purchase* of goods other than newspapers."

(d) Encroachment on Central field: Sales-tax not same as excise duty.

Another ground, on which the validity of sales-tax legislation was attacked as being beyond the legislative competence of the Provincial Legislature, was that the tax is really an excise duty which was within the exclusive jurisdiction of the Central Legislature under SCH. VII, LIST 1, Entry 45. This contention also was overruled and it was finally settled by the decision of the Privy Council in *Governor-General in Council* v. *Province of Madras*[4] that sales tax is, in pith

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1954 Mad 1030 (1038) [AIR V 41 C 360], *India Coffee & Tea Distributing Co.* v. *State of Madras.* (Do.)

[2] 1953 Mad 105 (Pr 6) : [AIR V 40 C 35] : 1953 Cri L Jour 277 (DB), *Syed Mohamed & Co.* v. *State of Madras.*

1953 Mad 116 (119) [AIR V 40 C 36] (DB), *Govindarajulu Naidu & Co.* v. *State of Madras.* (Madras General Sales Tax Act IX of 1939 was *intra vires* of the powers of the Provincial Legislature; it is not open to objection that it was an unconstitutional delegation by the Legislature of its functions to the executive; it is not repugnant to Art. 14 and the Rules framed thereunder are valid excepting only R. 16 (5).)

[3] 1953 Mad 105 (108) (Pr 6) [AIR V 40 C 35] : 1953 Cri L Jour 277 (DB).

[4] 1945 P C 98 (101) [AIR V 32] : 72 Ind App 91 : 1945 F C R 179 : ILR (1945) Kar (PC) 153 (PC). (Competing entries No. 45 of the Federal List and No. 48

and substance, different from excise duty and Provincial legislation imposing tax on the sale of goods could not be questioned as trespassing upon the Central field. For further discussion on this aspect of the subject see commentary on SCH. VII, LIST 2, Entry 54.

(e) No power to tax mere agreements to sell.

The State Legislature has only power to impose taxes on sales or purchases. A "sale" implies a *completed* sale. Hence, the State Legislature has no power to impose taxes on mere *agreements* to sell.[5]

(f) Forward contracts.

Where, therefore, a sales-tax enactment defines, for the purpose of the Act, a sale as including a forward contract, such a provision would be *ultra vires*, as a forward contract is only an agreement to sell and not a completed sale.[6] In this connection the following observations of the Supreme Court in *Sales Tax Officer* v. *Budh Prakash Jai Prakash*[7] may be quoted :

> "The position, therefore, is that a liability to be assessed to sales-tax can arise only if there is a completed sale under which price is paid or is payable and not when there is only an agreement to sell, which can only result in a claim for damages. It would be contrary to all principles to hold that damages for breach of contract are liable to be assessed to sales-tax on the ground that they are in the same position as sale price.
>
> "The power conferred under Entry 48 to impose a tax on the sale of goods can, therefore, be exercised only when there is a sale under which there is a transfer of property in the goods, and not when there is a mere agreement to sell. The State Legislature cannot, by enlarging the definition of 'sale' as including forward

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of the Provincial List may fairly be reconciled and the validity of Madras General Sales Tax Act (9 of 1939) cannot successfully be challenged—Confirming on appeal AIR 1943 F C 11 (FC) and approving of AIR 1942 F C 33 (FC).)

[*See also* 1942 F C 33 (35) [AIR V 29] (FC), *Province of Madras* v. *Boddu Paidanna & Sons.* (Both Central excise duty and Provincial sales-tax could be validly imposed on the *first sale* of ground-nut oil and cake by the manufacturer or producer as the two taxes are economically two separate and distinct imposts—Reversing on appeal AIR 1941 Mad 913.)

1939 F C 1 (9, 14) [AIR V 26] (FC), *C. P. & Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, In re.* (Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938 which levies tax on retail sales is not *ultra vires* the Legislature of the Central Provinces and Berar.)]

[5] 1954 S C 459 (461) [AIR V 41 C 110] : 1955 S C R 243 (S C), *Sales Tax Officer* v. *Budh Prakash Jai Prakash.*

[6] 1954 S C 459 (461) [AIR V 41 C 110] : 1955 S C R 243 (S C), *Sales Tax Officer* v. *Budh Prakash Jai Prakash.* (Definition of "sale" (as including forward contracts) in S. 2 (h) of U. P. Act XV of 1948 is to that extent *ultra vires* — For same reason, Explanation III to S. 2 (h) which provides that forward contracts "shall be deemed to have been completed on the date originally agreed upon delivery" and S. 3B providing for taxation of turnover in respect of forward contracts must be held to be *ultra vires.*)

[7] 1954 S C 459 (461, 462) (Pr 7) [AIR V 41 C 110] : 1955 S C R 243 (SC).

contracts, arrogate to itself a power which is not conferred upon it by the Constitution Act, and the definition of 'sale' in S. 2 (h) of Act XV of 1948 must, to that extent, be declared *ultra vires.*"

(g) Hire-purchase agreement.

It follows from the above that a provision for taxing a hire-purchase agreement treating it as a *sale* would be *ultra vires* the powers of the State Legislature under SCH. VII, LIST 2, Entry 54, inasmuch as such an agreement is essentially only a *hiring* agreement with an *option* to the hirer to purchase the goods.[8]

(h) Objection as to extra-territoriality.

Under ARTS. 245 and 246 (3), as well as under the corresponding Ss. 99 and 100 (3) of the Government of India Act, 1935, the jurisdiction of the Provincial or the State Legislature is limited to making laws for the Province or the State or any part thereof. This necessarily implies a territorial limitation on the power of the State Legislature or Provincial Legislature, and it means that a State Legislature or a Provincial Legislature cannot pass a taxation statute which would be binding on any other part of India outside the limits of the Province or the State.[9] But this does not mean that a State Legislature or a Provincial Legislature cannot pass legislation imposing or authorising the imposition of tax on a sale or purchase unless the sale takes place within the limits of the Province or the State. It is well settled that the existence of sufficient territorial *nexus* between a State and what it seeks to tax will give jurisdiction to the State Legislature to pass taxing legislation.[10] But in the absence of sufficient territorial *nexus* the taxing statute would be *ultra vires*. (See NOTES 3 and 6 for a fuller discussion of this aspect of the subject.)

(i) Ground based on infringement of fundamental rights.

Sales-tax legislation has also been challenged on the ground of infringement of Fundamental Rights. For instance, in the *State of Bombay* v. *United Motors (India) Ltd*,[11] the Bombay Sales Tax Act, 24 of 1952, was questioned on the ground that the provisions of the Act were discriminatory in their effect and, therefore, void under ART. 14 read with ART. 13 of the Constitution. (See NOTE 19.) In that case, it was also contended that as the Act was wholly *ultra vires* under ART. 286 the provisions of the Act requiring dealers to apply for registration in some cases and to obtain licence in some others as a condition of carrying on of business infringed the Fundamental Rights of the citizen under ART. 19 (1) (g) of the Constitution. But as the Supreme Court held that the Act and the rules thereunder were not *ultra vires* (excepting one rule, which was severable from the rest) the question of infringement of the rights under ART. 19 (1) (g) did not arise.

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[8] (1895) 1895 App Cas 471 (476) : 64 L J Q B 465, *Helby* v. *Matthews*.

[9] 1953 S C 274 (276) [AIR V 40 C 63] : 1953 Cri L Jour 1105 : 1953 S C R 677 (SC), *Poppatlal Shah* v. *State of Madras*.

[10] 1953 S C 252 (256) [AIR V 40 C 62] : 1953 S C R 1069 (S C), *State of Bombay* v. *United Motors (India) Ltd.* (The principle which is based on the decision of the Judicial Committee in *Wallace Brothers and Co. Ltd.* v. *Commr. of Income Tax, Bombay*, AIR 1948 P C 118 (PC), is applicable to sales-tax legislation.)

1953 S C 274 (276) [AIR V 40 C 63] : 1953 Cri L Jour 1105 : 1953 S C R 677 (SC), *Poppatlal Shah* v. *State of Madras* (Do.)

[11] 1953 S C 252 (262, 263) (Pr 29) [AIR V 40 C 62] : 1953 S C R 1069 (SC).

In impugning a Sales-tax Act, ART. 31 cannot be relied on as it deals with deprivation of property otherwise than by levying or collecting taxes.[12] (See also NOTE 20.)

(j) Unconstitutional delegation of legislative power.

Sales-tax legislation has been questioned on the ground that in delegating rule-making power to the Executive, the Legislature has unconstitutionally delegated legislative power to the Executive. Thus, in *Syed Mohamed and Co.* v. *State of Madras*,[13] the Turnover and Assessment Rules under the Madras General Sales-tax Act, 1939, were attacked as an unconstitutional delegation of legislative power but the contention was rejected by the Madras High Court, which, after an exhaustive discussion of the case-law, observed as follows :

> "In the present case, what the Legislature has done is merely to authorise the rule-making authorities to carry out the policies enunciated in the statute and to fill up the details. The Rules themselves are to come into operation only after they are approved by a resolution of the House. Far from effecting self-effacement, the Legislature has retained complete control over the legislation and in fact it has exerted that control by introducing amendments of the Act from time to time. It must, therefore, be held that the Madras Act IX of 1939 and the rules are not open to challenge on the ground of unconstitutional delegation."

(k) Infringement of Art. 286.

The sales-tax legislation which contravenes the provisions of this article will be *ultra vires*.[14]

(l) Principles laid down by Supreme Court.

Two important principles were laid down by the Supreme Court in dealing with the case :

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[12] 1955 S C 661 (669) (Pr 6) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

[13] 1953 Mad 105 (111) [AIR V 40 C 35] : 1953 Cri L Jour 277 (DB).

[14] 1955 S C 661 (678) (Pr 51) [AIR V 42 C 101] : (1955) 2 S C R 603 (S C), *Bengal Immunity Co.* v. *State of Bihar.* (The charging section of Bihar Sales Tax Act (1947) read with the relevant definitions cannot operate to tax inter-State sales or purchases and it must be held that as Parliament has not otherwise provided, the Act in so far as it purports to tax sales or purchases that take place in the course of inter-State trade or commerce, is unconstitutional, illegal and void.)

(m) Rules under Act can be considered in deciding validity of Act.

(i) The rules made under the Act, which were brought into force at the same time as the Act, could be treated as part and parcel of the Act. Even if the body of the Act did not provide for the exclusion of cases which would be exempt from taxation under this article, the Act would not be *ultra vires* if the Rules, which were brought into force simultaneously with the Act, provided for such exemption.[15]

(n) Principle of severability may be extended to separability in enforcement.

(ii) Taxing statutes imposing tax on subjects, divisible in their nature, which do not exclude in express terms subjects exempted by the Constitution, should not, for that reason, be declared wholly *ultra vires* and void. For in such cases, it is always feasible to separate taxes levied on authorised subjects from those levied on exempted subjects and to exclude the latter in the assessment of the tax. In such cases, the statute itself should be allowed to stand, the taxing authority being prevented by injunction from imposing the tax on subjects exempted by the Constitution.[16] It was pointed out in the majority judgment of the Supreme Court in the *State of Bombay* v. *United Motors (India) Ltd.*[17] that in the instant case the tax was imposed, on the ultimate analysis, on receipts from individual sales or purchases of goods effected during the accounting period and it was, therefore, possible to separate at the assessment the receipts derived from exempted sales or purchases and allow the State to enforce the statute with respect to the constitutionally taxable subjects, it being assumed that the State intends naturally to keep what it could lawfully tax even where it purports to authorise the taxation of what is constitutionally exempt. The principle is that severability in such cases includes separability in enforcement.

In this connection, the majority judgment in the *United Motors case*[18] referred to the decision of the Supreme Court of America in *Bowman* v. *Continental Oil Co.*[10] and distinguished and explained the Privy Council decision in *Punjab Province* v. *Daulat Singh*.[20] The majority judgment also distinguished the decision of the Supreme Court in *Romesh Thappar* v. *State of Madras*.[21]

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[15] 1953 S C 252 (263) [AIR V 40 C 627] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.* (Majority view—*Bose J.* dissenting.)

[16] 1955 S C 661 (683) (Pr 51) [AIR V 42 C 101] : (1955) 2 S C 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.* (*Held* : Bihar Sales Tax Act, 1947, in so far as it purports to tax sales or purchases that take place in the course of inter-State trade or commerce, is unconstitutional, illegal and void—But the Act imposes tax on subjects divisible in their nature, but does not exclude in express terms subjects exempted by the Constitution. In such a situation, the Act need not be declared wholly *ultra vires* and void, for it is feasible to separate taxes levied on authorised subjects from those levied on exempted subjects and to exclude the latter in the assessment of the tax. In these circumstances, it is difficult to say that the scheme of taxing inter-State sales forms such an integral part of the entire scheme of taxation on sales or purchases of goods as to be unextricably interwoven with it.)

[17] 1953 S C 252 (263) [AIR V 40 C 62] : 1953 S C R 1069 (SC).

[18] 1953 S C 252 (263) (Pr 30) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

[19] (1921) 65 Law Ed. 1139 : 256 U S 642.

(o) Provision authorising taxation of sale merely on basis of existence of goods in State or their being produced or manufactured there, is ultra vires.

In most of the Provincial Sales Tax Acts of the pre-Constitution period, although 'sale' was first defined as meaning transfer of the property in the goods so as to make the passing of the property within the Province the principal basis for the imposition of the tax, yet, by means of Explanations to that definition, they gave extended meanings to that word and thereby enlarged the scope of its operation. Thus, some of those Acts purported to tax a sale or purchase irrespective of the place where it took place if only the goods were within the Province at the time the contract for sale or purchase was made or the goods were produced or manufactured within the Province after the contract had been made.[22] Such provisions would be clearly *ultra vires* after the coming into force of the Constitution as they permit the imposition of a tax on sales or purchases of goods in cases in which such sales or purchases are exempt from taxation under this article.[23]

(p) Question of convenience or inconvenience of collection of sales-tax.

The convenience or inconvenience of collecting a sales-tax or purchase-tax is not a relevant consideration when one is considering the validity or otherwise of such a tax.[24] The Court should not be called upon to discard the cardinal rule of interpretation for mitigating a hardship which, after all, may be entirely fanciful, when the Constitution itself has expressly provided for another authority more competent to evaluate the correct position to do the needful.[25] But when the provisions bearing on the question are susceptible of conflicting constructions, the practical difficulties that are likely to be experienced if one or other of the possible constructions is adopted, may be taken into consideration in arriving at the probable intention of the Constitution-makers.[26]

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[20] 1946 P C 66 [AIR V 33 C 25] : 73 Ind App 59 : 1946 F C R 1 : ILR (1946) Kar (PC) 74 (PC).

[21] 1950 S C 124 [AIR V 37 C 7] : 1950 S C R 594 : 51 Cri L Jour 1514 (SC).

[22] 1953 S C 333 (341) [AIR V 40 C 78] : 1954 S C R 53 : ILR (1954) Trav-Co 1 (SC), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory*.

[23] 1954 S C 403 (405) (Pr 7) [AIR V 41 C 97] : 1954 SCR 1122 (SC), *Himmatlal Harilal* v. *State of Madhya Pradesh*. (Explanation II to S. 2 (g) of C. P. and Berar Sales Tax Act (2 of 1947) is *ultra vires* the State Legislature and mere production of goods in the State is not enough to make tax payable—AIR 1952 Nag 378, *approved*.)

1952 Nag 378 (387) (Pr 52) [AIR V 39] : ILR (1953) Nag 332, *Shriram Gulabdas* v. *Board of Revenue*.

[24] 1955 S C 661 (Pr 110) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar*. (Per *Bhagwati J.*: A I R 1949 F C 18 (F C), *Rel. on.*)

[25] 1955 S C 661 (685) [A I R V 42 C 101] : (1952) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar*.

(q) Single assessment for period both before and after Constitution — Validity.

Where there is a single assessment for the period before as well as after the Constitution and the assessment is bad as regards the period after the Constitution, by reason of the provisions of this article, the entire assessment should be treated as invalid.[27]

(See also Note 15.)

19. Sales-tax and Art. 14. — The validity of a sales-tax enactment may be questioned on the ground of the infringement of Art. 14. But in testing the validity of the Act, the Court will apply the principle of reasonable classification and uphold law if the discrimination, which it makes, is based on reasonable classification of the matters or the persons, with reference to whom the discrimination is made.

Thus, in *State of Bombay* v. *United Motors (India) Ltd.*[1] it was contended that the provisions of the Bombay Sales Tax Act, 1952, fixing a minimum amount as the taxable turnover, were discriminatory and hence the Act was void under Art. 14 read with Art. 13. The Supreme Court rejected the contention and held that the provision was a reasonable one. In doing so, the Supreme Court observed as follows :

> "...... it must be conceded that the general effect of fixing these minimum limits must necessarily be to enable traders whose taxable turnover is below those limits to sell their goods at lower prices to their customers than dealers whose turnover exceeded those limits, for the latter have to add the sales-tax to the prices of their goods. But no discrimination is involved in this classification which is perfectly reasonable when it is borne in mind that the State may not consider it administratively worthwhile to tax sales by small traders who have no organisational facilities for

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[26] *See* 1955 S C 661 (687) (Pr 47) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.* (See the judgment of S. R. Das Ag. C. J. (Para 47) where he discusses the great harassment and inconvenience that would be caused to merchants if they are assessed to sales-tax by the Governments of different States at the same time.)

1953 S C 333 (345) (Pr 42) [AIR V 40 C 78]: ILR (1954) Trav Co 1 : 1954 S C R 53 (SC), *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory.* (In this case also, S. R. Das, J., points out the harassment to traders that would result from their being subjected to sales-tax in respect of inter-State transactions.)

[27] 1955 S C 765 (770) (Pr 16) [(S) AIR V 42 C 106] : (1955) 2 S C R 483 (SC), *Ram Narain Sons Ltd.* v. *Assistant Sales Tax Commissioner.* (*Bennett and White (Calgary) Ltd.* v. *Municipal District of Sugar City No. 5,* (1951) 1951 App Cas 786 at p. 816, *Foll.*)

Article 286 — Note 19

[1] 1953 S C 252 (263) (Pr 29) [AIR V 40 C 62] : 1953 S C R 1069 (SC).

collecting the tax from their buyers and turn it over to the Government. Each State must, in imposing a tax of this nature, fix its own limits below which it does not consider it administratively feasible or worthwhile to impose the tax. It is idle to suggest that any discrimination is involved in such classification."

In *Syed Mohamed and Co.* v. *State of Madras*[2] it was contended that the provisions of the Madras General Sales Tax Act, 1939, and the Rules framed thereunder are discriminatory in that they impose a sales-tax in some cases on the purchaser, while laying it on the sellers in other cases; that there was no rational basis for this differentiation and that it is therefore repugnant to ART. 14. The contention was rejected by the Madras High Court. In rejecting the contention the Madras High Court discussed exhaustively the principles and the case-law relating to the true scope and meaning of the equality clause and pointed out that in regard to taxing statutes, the Legislature enjoys wide power of classification. It has the power to determine which class of persons or properties shall be taxed and such determination is not open to question on the ground that the tax is not levied on all persons or on all properties. As observed by Willis, in his CONSTITUTIONAL LAW OF THE UNITED STATES, 1936, p. 587, "A State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably." The Madras High Court observed as follows :

> "If it is competent to the Legislature to select some commodities and impose tax on them, such imposition is not open to attack on the ground that it is not made on all commodities. A law imposing a tax only on the sale of hides and skins and making the purchaser liable therefor, could not be challenged under ART. 14 on the ground that purchasers of other commodities were not also taxed. If among the purchasers of hides and skins a differentiation was made without a rational basis therefor, different considerations would arise. Here, there is one law of taxation made applicable to all purchasers in the same trade and such a measure is not open to attack under ART. 14. At any rate as observed in *Madden* v. *Kentucky*,[3]
>
> > 'in taxation even more than in other fields, Legislatures possess the greatest freedom in classification. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,'
>
> and that burden has not been discharged by the petitioners."

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[2] 1953 Mad 105 (115) (Pr 29) [AIR V 40 C 85] : 1953 Cri L Jour 277 (DB).

[3] (1940) 84 Law Ed 590 (593) : 309 U S 83.

In the above case, it was also argued that the distinction made by the Rules under the Madras General Sales Tax Act between licensed dealers and unlicensed dealers was an arbitrary distinction repugnant to ART. 14. This contention was also rejected, the Court observing as follows :

> "A classification of merchants into those who take out licences and those who do not is one resting on a rational basis and must be upheld. Moreover, if it is a discrimination, it is one in favour of those who take out licences and against those who do not and it is difficult to see how the petitioners who are licence holders can make a complaint of it."

In *Buchi Rajalingam* v. *State of Hyderabad*,[4] also, it was held (by the Hyderabad High Court) that there is nothing objectionable if in the case of certain commodities, a tax is levied on the purchase turnover, while in the case of others, the tax is levied on the sales.

See also ART. 14, NOTE 17 and ART. 265, NOTE 7.

20. Constitutional remedies for illegal taxation.—Where a Sales Tax Act is *ultra vires* as violating the provisions of this article or otherwise, the imposition of sales or purchase tax under colour of such Act will be a violation of the Fundamental Rights of a citizen under ART. 19 (1) (g), as the imposition of such tax will mean an unwarranted restriction of the right to carry on business.[1] In such a case, therefore, a writ application under ART. 32 or ART. 226 will lie for the enforcement of the Fundamental Right.[2] Even where the

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[4] 1954 Hyd 1 (11) (Pr 35) [AIR V 41 C 1] : ILR (1953) Hyd 673 (FB). (There is no "inequality" either because in a purchase turnover only the purchaser is taxed and in a sale transaction only the seller is taxed.)

Article 286 — Note 20

[1] 1955 S C 661 (669) (Pr 5) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

1954 S C 403 (405) (Pr 9) [AIR V 41 C 97] : 1954 S C R 1122 (SC), *Himmatlal Harilal* v. *State of Madhya Pradesh.* (The Supreme Court (Mahajan C. J.) observed: "In *Mohd. Yasin* v. *Town Area Committee*, AIR 1952 S C 115 (SC). it was held by this Court that a licence fee on a business not only takes away the property of the licensee but also operates as a restriction on his Fundamental Right to carry on his business and therefore if the imposition of a licence fee is without authority of law it can be challenged by way of an application under Art. 32, *a fortiori* also under Art. 226. These observations have apposite application to the circumstances of the present case".)

1953 S C 252 (256) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

[*See also* 1952 S C 115 (117) (Pr 7) [A I R V 39 C 22] : 1952 S C R 572 (SC), *Mohammad Yasin* v. *Town Area Committee, Jalalabad.*]

[2] 1955 S C 661 (699) (Pr 5) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

1954 S C 403 (405) [AIR V 41 C 97] : 1954 S C R 1122 (SC), *Himmatlal Harilal* v. *State of Madhya Pradesh.*

Sales Tax Act is not impeached as *ultra vires* but the assessment is questioned as not being according to the Act, it would be a case of infringement of the Fundamental Right of the assessee.[3] In cases of infringement of Fundamental Rights, the contention that because a remedy under the impugned Act was available to the applicant, he was not entitled to relief under ART. 226, will not be tenable.[4] The reason is that the principle that a Court will not issue a prerogative writ when an adequate alternative remedy was available will not apply where a party comes to the Court with an allegation that his Fundamental Right has been infringed and seeks relief under ART. 226.[5] The remedy under an Act cannot be said to be adequate and is indeed nugatory or useless, if the Act which provides for such remedy is itself *ultra vires* and void, and the above principle can have no application where a party comes to Court with an allegation that his right has been or is being threatened to be infringed by a law, which is *ultra vires* the powers of the Legislature which enacted it and as such void.[6] Even assuming that the party complaining is a *company* and that a juristic person like a company is not entitled to the Fundamental Rights conferred by ART. 19, if the impugned Act contravenes the provisions of this article and is, consequently, *ultra vires*, the remedy by way of a writ must, on principle and authority,

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[*See* 1954 S C 311 (312) [AIR V 41 C 73] : 1954 S C R 955 (SC), *Soma Singh* v. *State of Pepsu*. (Application under Art. 32 was entertained though dismissed on the merits.)]

3. 1955 Mad 363 (365) (Pr 5) [AIR V 42 C 96] (DB), *Metha Bros.* v. *Secretary (Commercial Taxes) Board of Revenue*. (*Held*, on the facts, that the assessment in question could not be sustained on the merits and was illegal. *Held further*, that even if a limited construction of the scope of Art. 226 of the Constitution were to be adopted, the petitioners were entitled to relief under Art. 226 as the petition really involved the *ultra vires* nature of the tax and further the petitioners' right to property was affected by the illegal imposition of sales-tax. The petitioners having exhausted all the remedies which were available to them under the General Sales Tax Act, as it then stood, there could be no technical objection to the High Court interfering to quash the assessment.)

4. 1954 S C 403 (405) [A I R V 41 C 97] : 1954 S C R 1122 (SC), *Himmatlal Harilal* v. *State of Madhya Pradesh*. ("Such a contention stands negatived by the decision of the Supreme Court in AIR 1953 S C 252 (SC).")

1955 S C 661 (668) (Pr 5) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar*.

5. 1955 S C 661 (668, 669) (Pr 5) : [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar*.

1954 S C 403 (405) [AIR V 41 C 97] : 1954 S C R 1122 (SC), *Himmatlal Harilal* v. *State of Madhya Pradesh*.

1953 S C 252 (256) (Pr 8) [A I R V 40 C 62] : 1953 S C R 1069 (SC). *State of Bombay* v. *United Motors (India) Ltd.*

6. 1955 S C 661 (669) (Pr 6) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar*.

be available to the party aggrieved.[7] Moreover, where the remedy provided by the Act is of an onerous and burdensome character and before the appellant can avail of it, he has to deposit the whole amount of the tax, such a provision can hardly be described as an adequate alternative remedy.[8]

It is not necessary that, before a party can apply for relief under ART. 226, he must have been assessed to tax or assessment proceedings must have been actually started against him, where the circumstances clearly show that there is every likelihood of the party being required to pay the tax[9]. In *Himmatlal Harilal* v. *State of Madhya Pradesh*,[10] the applicant, after having paid the tax for some period, thereafter declined to do so for the subsequent period, realising that he was not liable for the payment of tax in the particular State. Apprehending that he may be subjected to the payment of the tax without authority of law, an application was made to the High Court under ART. 226 for an appropriate writ which may secure to the applicant protection from the impugned Act and its enforcement by the State. The High Court, while holding that the impugned provisions were *ultra vires*, dismissed the petition on the ground that mandamus issues only to compel an authority to do or to abstain from doing some act, that it is seldom anticipatory and certainly never issues where the action of the authority is dependent on some action of the petitioner and that in the present case, the petitioner had not even made his return and no demand for the tax could be made from him. On appeal the Supreme Court held that the case was a fit one for the issue of a writ to prevent the enforcement of the Act against the appellant. In doing so, the Supreme Court observed as follows :

> "It is plain that the State evinced an intention that it could certainly proceed to apply the penal provisions of the Act against the appellant if it failed to make the return or to meet the demand and in order to escape from such serious consequences threatened without authority of law, and infringing Fundamental Rights, relief by way of a writ of mandamus was clearly the appropriate relief."

In *Bengal Immunity Co.* v. *State of Bihar*[11] also, it was contended that the application for writ was premature for there had been no investigation or finding on facts and no assessment under the impugned Sales Tax Act. It was argued that as the applicant company contended that the Act was *ultra vires* and void, it should have ignored the notice served on it and should not have rushed into Court at this stage. In rejecting this contention, the Supreme Court observed as follows:

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[7] 1955 SC 661 (669) (Pr 6) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

[8] 1954 S C 403 (406) (Pr 9) [AIR V 41 C 97] : 1954 S C R 1122 (SC), *Himmatlal Harilal* v. *State of Madhya Pradesh.*

[9] 1955 SC 661 (669) (Pr 7) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

1954 S C 403 (405) (Pr 9) [A I R V 41 C 97] : 1954 S C R 1122 (SC). *Himmatlal Harilal* v. *State of Madhya Pradesh.*

[10] 1954 SC 403 (405) (Pr 9) [AIR V 41 C 97] : 1954 S C R 1122 (SC).

[11] 1955 S C 661 (669) (Pr 7) [AIR V 42 C 101] : (1955) 2 SCR 603 (SC).

> "This line of argument appears to us to be utterly untenable. In the first place, it ignores the plain fact that this notice, calling upon the appellant company to forthwith get itself registered as a dealer, and to submit a return and to deposit the tax in a treasury in Bihar, places upon it considerable hardship, harassment and liability which, if the Act is void under ART. 265 read with ART. 286, constitute, *in præsenti*, an encroachment on and an infringement of its right which entitles it to immediately appeal to the appropriate Court for redress.
>
> "In the next place, as was said by this Court in *Commissioner of Police, Bombay* v. *Gordhandas Bhanji*[12] when an order or notice emanates from the State Government or any of its responsible officers directing a person to do something, then, although the order or notice may eventually transpire to be *ultra vires* and bad in law, it is obviously one which *prima facie* compels obedience as a matter of prudence and precaution.
>
> "It is, therefore, not reasonable to expect the person served with such an order or notice to ignore it on the ground that it is illegal, for he can only do so at his own risk and peril. This Court has said in the last mentioned case that a person placed in such a situation has the right to be told definitely by the proper legal authority exactly where he stands and what he may or may not do."

The undermentioned decisions[13] proceed on the view that the existence of an alternative remedy under the sales-tax enactment itself would disentitle the assessee to relief under ART. 226. These decisions must, to that extent, be treated as impliedly overruled by the decisions of the Supreme Court discussed above.

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[12] 1952 S C 16 (21, 22) [AIR V 39 C 5] : 1952 S C R 135 (SC).

[13] 1953 Pat 87 (89) (Pr 3, 4) [AIR V 40 C 26] : I L R 32 Pat 19 (DB), *Bengal Immunity Co.* v. *State of Bihar.*

1953 Pat 78 (79, 80) (Pr 5, 10) [AIR V 40 C 24] : ILR 32 Pat 36 (DB), *Diamond Coal Co. Ltd.* v. *State of Bihar.*

1953 Mad 131 (132) (Pr 2) [AIR V 40 C 38] (DB), *Jamal Mohideen Saheb & Co.* v. *State of Madras.*

1953 Mad 116 (119) [AIR V 40 C 36] (DB), *Govindarajulu Naidu & Co.* v. *State of Madras.* (Objections that could be urged before Sales Tax Tribunal would not be entertained by High Court in writ application under Art. 226—Only objections relating to validity of Act would be open to applicant — Objection that imposition of tax was in contravention of Art. 286 could be entertained by Sales Tax Tribunal but on the request of both the parties the High Court dealt with the objections on the merits.)

In *Raleigh Investment Co. Ltd.* v. *Governor-General in Council,*[14] it was held that though an assessment to income-tax may be made under a provision which is subsequently held to be *ultra vires*, such assessment would only be vitiated by a mistake of law and not absence of jurisdiction and hence a suit challenging the assessment would be barred under S. 67 of the Income-tax Act, 1922. The decision proceeded on the distinction between an assessment which was a nullity and one which was *ultra vires.* For a similar decision of the Privy Council, see *Commissioner of Income-tax West Punjab, North-West Frontier and Delhi Provinces, Lahore* v. *Tribune Trust Lahore.*[15]

In *Raleigh Investment Co.'s case*[16] it was also held by the Privy Council that the provision of a self-contained machinery under the Income-tax Act itself for decision of questions relating to the validity of assessments "marched with a construction of S. 67 of the Act which denied an alternative jurisdiction to inquire into the same subject-matter."

It must be held that in view of the decisions of the Supreme Court,[17] referred to above, the above decisions of the Privy Council cannot be urged against applications for appropriate writs under this Constitution in respect of assessments based on legal provisions challenged as *ultra vires*.

The constitutional invalidity of taxing provisions can also be pleaded in *defence* to a criminal prosecution for failure to pay the sales-tax, and it is no bar to such a plea that the accused did not

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1953 Mad 105 (107) [AIR V 40 C 35] : 1953 Cri L Iour 277 (DB), *Syed Mohamed & Co.* v. *The State of Madras.* (Petitioner who has not availed himself of remedy under the Sales Tax Act cannot urge in writ application pleas which he could have taken in proceedings under the Act — Only pleas open in writ proceedings are pleas that could not have been urged before Sales Tax Tribunal, (e. g.) that the Act is ultra vires.)

[14] 1947 P C 78 (80) (Pr 14) [AIR V 34 C 19] : 74 Ind App 50 : 1947 F C R 59 : ILR (1947) Kar (PC) 178 (PC). (See the case discussed in Art. 226, Note 13).

[15] 1948 P C 102 (106) (Pr 34) [AIR V 35 C 30] : 74 Ind App 306 : I L R (1947) Lah 809 (PC).

[16] 1947 P C 78 (80) (Pr 18) [AIR V 34 C 19] : 74 Ind App 50 : 1947 F C R 59 : I. L R (1947) Kar (PC) 178 (PC), *Raleigh Investment Co. Ltd.* v. *Governor-General in Council.*

[17] 1955 S C 661 (669) (Pr 7) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*

1954 SC 403 (405) (Pr 9) [A I R V 41 C 97] : 1954 S C R 1122 (SC). *Himmatlal Harilal* v. *State of Madhya Pradesh.*

1952 SC 16 (21, 22) [A I R V 39 C 5] : 1952 S C R 135 (SC), *Commissioner of Police, Bombay* v. *Gordhandas Bhanji.*

avail himself of the remedies provided by the Sales Tax Act itself.[18] Moreover, a provision in a Sales Tax Act precluding such a defence would be *ultra vires*.[19]

Where a Sales Tax Act fails to exempt from tax transactions which are entitled to such exemption under this article, the whole Act need not be declared void, but the sales-tax authorities may be prevented by injunction from levying the tax in respect of the exempted transactions.[20]

See also NOTE 18.

See also ART. 265, NOTE 10 and ART. 226, NOTES 13 and 35.

21. Nature of sales-tax.—A sales-tax is an important example of an indirect tax like customs duties and excise duties. A direct tax is one which is collected from the person who, it is intended, should pay, while in an indirect tax, tax is demanded from one person with the expectation and with the intention that he shall indemnify himself at the expense of another.[1] The sales-tax is an indirect tax because, although it may be collected in the first instance from the vendor, he is entitled to add it to the selling price and realize it from the purchaser, so that the incidence of the tax really falls on the consumer.[2]

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[18] 1954 Mad 833 (840) (Pr 20) [AIR V 41 C 281] : I L R (1955) Mad 184 : 1954 Cri L Jour 1267 (DB), *In re Guruviah Naidu & Co.*
[But see 1955 Trav-Co 220 (223) [(S) A I R V 42 C 88] : 1955 Cri L Jour 1289 (FB), *In re P. K. Velayudhan.*
1953 Mad 105 (107) [AIR V 40 C 35] : 1953 Cri L Jour 277 (DB), *Syed Mohamed & Co.* v. *State of Madras.* (Section 16A, Madras General Sales Tax Act, 1939, provided that in a criminal prosecution for failure to pay sales-tax, the assessee cannot raise objection that the assessment was not legal—This section was impugned on the ground that it was opposed to natural justice—Contention rejected on the ground that the Act provided ample opportunity to show that the tax should not be levied.)]

[19] 1954 Mad 833 (845) (Pr 29) [AIR V 41 C 281] : I L R (1955) Mad 184 : 1954 Cri L Jour 1267 (DB), *In re Guruviah Naidu & Co.* (Section 16A, Madras General Sales Tax Act, 1939, is ultra vires of the Constitution and also as being repugnant to the provisions of the Criminal Procedure Code.)
[But see 1955 Trav-Co 220 (223) [(S) A I R V 42 C 88] : 1955 Cri L Jour 1289 (FB), *In re P. K. Velayudhan.*
1953 Mad 105 (107) (Pr 3) [A I R V 40 C 35] 1953 Cri L Jour 277 (DB), *Syed Mohamed & Co.* v. *State of Madras.* (Section 16A of Madras General Sales Tax Act, 1939, is not *ultra vires* as being opposed to principles of natural justice.)]

[20] 1955 S C 661 (688) [A I R V 42 C 101] : (1955) 2 S C R 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.*
1953 S C 252 (263) [AIR V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.* (It is a sound rule to extend severability to include separability in enforcement in such cases.)

Article 286 — Note 21

[1] 1930 P C 10 (12) [AIR V 17] (PC), *Eri Beach Co. Ltd.* v. *Attorney-General of Ontario.*

[2] 1954 Hyd 1 (10) (Pr 33) [A I R V 41 C 1] : I L R (1953) Hyd 673 (FB), *Buchi Rajalingam* v. *State of Hyderabad.*

A sales-tax is essentially a tax on the *transaction* of sale.[3] In *Madras Province* v. *Doddu Paidanna and Sons*,[4] Gwyer, C. J., observed as follows :

> "The tax on the sale of goods, which the Act assigns exclusively to the Provincial Legislatures, is a tax levied on the occasion of the sale of the goods. Plainly a tax levied on the first sale must in the nature of things be a tax on the sale by the manufacturer or producer; but it is levied upon him *qua* seller and not *qua* manufacturer or producer."

The sales-tax is imposed, in ultimate analysis, on receipts from individual sales or purchases of goods effected during the accounting period.[5]

A tax may be levied either on the seller or on the purchaser. Where the Legislature is empowered to impose a tax on the sale of goods, a law under which the purchaser can be taxed is not *ultra vires*.[6] The reason is, as already stated, the tax is on the transaction of sale and may be levied on either party to the transaction.

It is now settled that a sales-tax is essentially different from an *excise* duty. See NOTE 18.

Sales-tax is also essentially different from income-tax in two respects :

(i) income-tax is a direct tax, while sales-tax is an indirect tax;

(ii) income-tax is payable only on the net income and not on the gross income of a person, while sales-tax is levied on the gross proceeds of the sale.

Moreover, as already stated, sales-tax is only a tax on the transaction of sale, so that it may be imposed even on the purchaser. Thus, the receipt of the price by the assessee is not the basis of the taxation, but it is the transaction that is the basis and price is only the measure of the tax.

The nature and scope of sales-tax have been described as follows:[7]

1953 Mad 105 (108) [AIR V 40 C 35] : 1953 Cri L Jour 277 (DB), *Syed Mohamed & Co.* v. *State of Madras.*

3. 1942 F C 33 (35) [A I R V 29] (FC), *Madras Province* v. *Boddu Paidanna & Sons.*

4. 1942 F C 33 (35) [AIR V 29] (FC).

5. 1953 S C 252 (263) (Pr 30) [A I R V 40 C 62] : 1953 SCR 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

1955 Mad 314 (322) (Pr 19) [(S) A I R V 42 C 88] : ILR (1955) Mad 579 (FB), *State of Madras* v. *K. H. Chambers.*

6. 1954 Hyd 1 (10) [AIR V 41 C 1] : ILR (1953) Hyd 673 (FB), *Buchi Rajalingam* v. *State of Hyderabad.*

1953 Mad 105 (108) [AIR V 40 C 35] : 1953 Cri L Jour 277 (DB), *Syed Mohammed & Co.* v. *State of Madras.*

7. 1953 Mad 105 (108) (Pr 8) [AIR V 40 C 35] : 1953 Cri L Jour 277 (DB) *Syed Mohamed & Co.* v. *State of Madras.*

"Sales-taxes may be imposed upon total receipts with deductions for returns, allowances and possible other items, upon the individual transaction; upon the privilege of conducting business, which is supposedly measured by sales; upon sales in general or upon specified types of sale. Not only different jurisdictions but also the same jurisdiction may employ varying basis of taxation. Taxes may be collected from vendors in general or from a certain class or classes of vendors. Customarily the vendor rather than the vendee is liable for taxation, although both may be held responsible for proper payment of the tax."

Sales-tax, the incidence of which is really directed against the consumer, is in substance a tax on the goods, imposed, no doubt, on the occasion of the sale as a taxable event.[8] On this view it was held by the Supreme Court in the *State of Bombay* v. *United Motors India Ltd.*,[9] that inasmuch as the Constitution (ART. 304) permitted the levy of *non-discriminatory* taxes by a State on goods imported from another State, notwithstanding the freedom of inter-State trade and commerce guaranteed by ART. 301, the provisions of cl. (2) (prohibiting (until Parliament provided otherwise by law) the levy of taxes by States on sales and purchases of goods taking place in the course of inter-State trade or commerce) would not come in the way of a State imposing a tax on a sale involving inter-State elements where, as a direct result of the sale, the goods were actually delivered for consumption in the taxing State. This view, however, has been overruled in the *Bengal Immunity Co.* v. *State of Bihar.*[10]

Tax on a sale which occasions the export of an article is not a tax on the export of the article and hence it would have been within the competence of the State Legislature to impose under SCH. VII, LIST 2, Entry 54, had it not been for the prohibition in cl. (1) (b) of this article. Similarly, a tax on a purchase, which occasions the import of an article into the country, is essentially different from a tax on import of the article and would have been within the competence of the State Legislature to impose but for the prohibition in cl. (1) (b) of this article. Although in such cases the transaction of import or export is only another aspect of the transaction of sale or purchase, yet the aspect of sale or purchase and that of export or import must be kept distinct from each other for determining whether the tax is within the power of the State Legislature or not.[11]

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[8] 1955 SC 661 (718) (Pr 130) [AIR V 42 C 101] : (1955) 2 SCR 603 (SC), *Bengal Immunity Co.* v. *State of Bihar.* (*Jagannadhadas J.* — Sch. VII, List II Entry 54 (conferring power on States to levy taxes on sales or purchases of goods) does not, in terms, say that the sales or purchases of goods contemplated thereby as taxable are to be sales or purchases "within the State". The apparently wide language of Entry 54 is in recognition of the theory that in substance a tax on sale or purchase of goods is a tax on the goods with reference to the event of sale or purchase thereof. See the *United Motors' Case*, AIR 1953 S C 252 (SC).)

1953 S C 252 (260) (Pr 11) [A I R V 40 C 62] : 1953 S C R 1069 (SC), *State of Bombay* v. *United Motors (India) Ltd.*

[See however 1955 Mad 314 (322) (Pr 19) [(S) A I R V 42 C 88] : I L R (1955) Mad 579 (FB). *State of Madras* v. *K. H. Chambers.* (Sales-tax is tax on individual sales and purchases and not on the *goods*).]

[9] 1953 S C 252 (260) (Pr 20) [AIR V 40 C 62] : 1953 S C R 1069 (SC).

[10] 1955 S C 661 (687) (Prs. 4, 8) [AIR V 42 C 101] : (1955) 2 S C R 603 (SC).

22. American decisions. — The American Constitution also contains provisions restrictive of the power of the States to impose taxes affecting inter-State trade and export and import. (See NOTE 1.) But the wording of the provisions is different and, hence, the American decisions bearing thereon are not applicable in their entirety to the determination of questions arising under cl. (1) (b) and cl. (2) of this article. This has been pointed out by the Supreme Court in the *first Travancore case.*[1] See NOTE 13 (m).

Broadly speaking, two theories evolved by the American decisions have been sought to be imported into the discussion of questions arising under this article. These theories are : (i) the 'Stream' theory, and (ii) the 'Original Package' theory.

(a) Stream theory

The stream theory has already been explained in NOTE 13 (m). This theory has been relied on in support of the argument that the exemption under cl. (1) (b) only applies to sales and purchases which take place when the goods are actually in transit, because, according to the American decisions, the restriction on the power of the States to impose taxes affecting exports applies only where the goods have actually entered the "export stream", i. e., where the goods have actually left the shores of the exporting country.[2] But as seen in NOTE 13, the Supreme Court has in *State of Travancore-Cochin* v. *Bombay Co. Ltd.*[3] rejected this argument and has held that the exemption under cl. (1) (b) of this article will extend to export-sales, i. e., sales which occasion the export although it is obvious that such sales take place before the export journey actually begins.

At the same time, the Supreme Court in *State of Travancore-Cochin* v. *Shanmugha Vilas Cashew-nut Factory*[4] referred to the theory in support of its view that a purchase by a person *for the purpose of export* is not one in the course of export, within the meaning of cl. (1) (b) of this article.

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[11] 1952 S C 366 (368) [AIR V 39] : 1952 S C R 1112 : ILR (1953) Trav.Co 337 (SC), *State of Travancore-Cochin* v. *Bombay Co. Ltd.*

Article 286 — Note 22

[1] 1952 SC 366 (368) (Pr 15) [AIR V 39] : 1952 S C R 1112 : ILR (1953) Trav-Co 337 (SC), *State of Travancore-Cochin* v. *Bombay Co. Ltd.*

[2] 1952 S C 366 (368) (Pr 15) [AIR V 39] : 1952 S C R 1112 : I L R (1953) Trav-Co 337 (SC), *State of Travancore-Cochin* v. *Bombay Co. Ltd.*

[3] 1952 S C 366 (367, 368) (Pr 10) [A I R V 39] : 1952 S C R 1112 : I L R (1953) Trav-Co 337 (SC).

[4] 1953 SC 333 (337) [AIR V 40 C 73] : 1954 SCR 53 : ILR (1954) Trav-Co 1 (SC).

(b) The doctrine of Original Package

It has already been mentioned that the American Constitution restricts the power of the State to tax imports. In connection with this provision, what is known as the doctrine of original package was evolved in America. This doctrine was applied not only to commodities imported from foreign countries but also commodities which were the subject of inter-State commerce. The doctrine laid down that importation was not over so long as the goods were in the original package and hence a State had no power to tax imports until the original package was broken or there was one sale while the goods were still in the original package.[5]

The above doctrine was referred to in the majority judgment of the Supreme Court in the *State of Tranancore-Cochin* v. *Shanmugha Vilas Cashew-nut Factory*,[6] in connection with the question whether the first sale after import by an importer is a sale in the course of import so as to be exempt from liability to sales-tax under cl. (1) (b). The Supreme Court refused to import the doctrine into the Indian Constitution and in doing so, pointed out how the application of the doctrine had given rise to difficulties even under the American Constitution. In this connection, it may be mentioned that the Supreme Court had already held in *State of Bombay* v. *F. N. Balsara*,[7] that "the doctrine has no place in this country" following the lead of Gwyer, C. J., in the earlier case of *Province of Madras* v. *Boddu Paidanna and Sons*.[8]

From the above, it would seem that the following points of contrast between the American and Indian laws on this point may be drawn :

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[5] 1951 SC 318 (323) [AIR V 38 C 55] : 1951 SCR 682 : 52 Cri L Jour 1361 (SC), *State of Bombay* v. *F. N. Balsara*.

(1933) 77 Law Ed 710 (713, 716) : 288 U S 218, *Anglo Chilean Nitrate Sales Corpn.* v. *Alabama*. (Appellant was importer of nitrate from Chile and selling it to purchasers in original packages *Held* tax by Alabama on these sales was repugnant to Art. 1, S. 10 (2) of American Constitution as amounting to tax on imports.)

(1827) 6 Law Ed 678 (688) : 12 U S 419, *Brown* v. *State of Maryland*. (It was held that requiring importer to take out licence before selling goods imported amounted to levy of tax on 'imports' within Art. 1, S. 10 (2) of the American Constitution.)

[6] 1953 S C 333 (337) [AIR V 40 C 78] : 1954 S C R 53 : I L R (1954) Trav-Co 1 (SC).

[7] 1951 S C 318 (325) (Prs 10, 11) [A I R V 38 C 55] : 1951 S C R 682 : 52 Cri L Jour 1361 (SC).

[8] 1942 F C 33 [AIR V 29] (FC).

(i) As regards *exports*, the *American* view seems to be that unless and until the goods have been put on board, the export does not begin so as to affect the taxing power of the States. But under the *Indian* law, even a sale which *occasions* the export will be a sale "in the course of export" and exempt from taxation. Thus, as regards "export", the Indian view seems to *extend* the meaning of the word beyond what it signifies under the American view.

(ii) As regards *imports*, the Indian view seems to ascribe to the word 'import' a more restricted meaning than the American view, by rejecting the American doctrine of "original or unopened package".

Thus, as compared with the American view, the Indian view seems to be more extensive in one respect and more restrictive in another respect.

23. **"Stream theory".**—See Notes 13 and 22.

24. **Doctrine of original or unopened package.** — See Note 22.

Exemption from taxes on electricity.

287. Save in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the consumption or sale of electricity (whether produced by a Government or other persons) which is—

(a) consumed by the Government of India, or sold to the Government of India for consumption by that Government; or

(b) consumed in the construction, maintenance or operation of any railway by the Government of India or a railway company operating that railway, or sold to that Government or any such railway company for consumption in the construction, maintenance or operation of any railway,

and any such law imposing, or authorising the imposition of, a tax on the sale of electricity shall secure that the price of electricity sold to the Government of India for consumption by that Government, or to any such railway company as aforesaid for consumption in the construction, maintenance or operation of any railway, shall be less by the amount of the tax than the price charged to other consumers of a substantial quantity of electricity.

GOVERNMENT OF INDIA ACT, 1935

For text of S. 154-A, which corresponded to ART. 287, see NOTE 1.

JAMMU AND KASHMIR

Article 287 applies to the State of Jammu and Kashmir—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

State—Meaning of, see Art. 264 (b).
Tax—Interpretation of, see Art. 366 (28).
Railway—Interpretation of, see Art. 366 (20).

Synopsis

1. Analogous law.
2. Scope of the article.

1. Analogous law.—Government of India Act, 1935, S. 154-A corresponds exactly to this article and reads as follows:

> "**154A.** Save in so far as any Federal law may otherwise provide, no Provincial law or law of a Federated State shall impose, or authorise the imposition of, a tax on the consumption or sale of electricity (whether produced by a Government or other persons) which is—
>
> (a) consumed by the Federal Government, or sold to the Federal Government for consumption by that Government; or
>
> (b) consumed in the construction, maintenance or operation of a Federal Railway by the Federal Railway Authority or a railway company operating that railway, or sold to that Authority or any such railway company for consumption in the construction, maintenance or operation of a Federal Railway;
>
> and any such law imposing, or authorising the imposition of, a tax on the sale of electricity shall secure that the price of electricity sold to the Federal Government for consumption by that Government, or to the Federal Railway Authority or any such railway company as aforesaid for consumption in the construction, maintenance or operation of a Federal Railway, shall be less by the amount of the tax than the price charged to other consumers of a substantial quantity of electricity."

2. Scope of the article.—Under SCH. VII, LIST II, Entry 53, the State Legislature has exclusive power of making laws as to the imposition of taxes on the consumption or sale of electricity. This article and ART. 288 impose certain restrictions on this power of the State Legislature. The restrictions can be compared to the Doctrine of Immunity of Instrumentalities developed under the American Constitution. (See ART. 246, NOTE 13.) Under this article, the restrictions relate to the taxes on the consumption or sale of electricity supplied to the Central Government and to the railways (under LIST 1, Entry 22, Railways are a Central subject). Under ART. 288, the restriction relates to taxes in respect of electricity or water stored generated, consumed, distributed or sold by authorities constituted for developing any inter-State river or river-valley.

Under this article, restrictions are of two kinds: Firstly, it is provided that unless the Parliament has, by law, permitted the imposition of taxes on the consumption or sale of electricity supplied to the Central Government or Railways, such taxes shall not be imposed. Secondly, there is a provision, the effect of which is that even when the Parliament has by law permitted the imposition of such taxes, the law by which such taxes are imposed must provide that the price, at which the electricity is sold to the Central Government or the Railway, must be less by the amount of the tax than that at which it is supplied to other consumers. In other words, the tax is required to be borne by the producer and not by the consumer as in ordinary cases.

As to the applicability of the Doctrine of Immunity of Instrumentalities to the Indian Constitution, see ART. 246, NOTE 13.

Exemption from taxation by States in respect of water or electricity in certain cases.

288. (1) Save in so far as the President may by order otherwise provide, no law of a State in force immediately before the commencement of this Constitution shall impose, or authorise the imposition of, a tax in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by Parliament for regulating or developing any inter-State river or river-valley.

Explanation.—The expression "law of a State in force" in this clause shall include a law of a State passed or made before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

(2) The Legislature of a State may by law impose, or authorise the imposition of, any such tax as is mentioned in clause (1), but no such law shall have any effect unless it has, after having been reserved for the consideration of the President, received his assent; and if any such law provides for the fixation of the rates and other incidents of such tax by means of rules or orders to be made under the law by any authority, the law shall provide for the previous consent of the President being obtained to the making of any such rule or order.

JAMMU AND KASHMIR

Article 288 applies to the State of Jammu and Kashmir. — The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS.

State—Meaning of, see Art. 264 (b).

Commencement of this Constitution—Meaning of — This Constitution came into force on 26-1-1950—See ART. 394.

1. **Scope.**—This article imposes restrictions on the power of a State to levy taxes in respect of two matters, namely, water and electricity. The restriction relates to water or electricity stored, generated, consumed, distributed or sold by any authority established by law for regulating or developing any inter-State river or river-valley. Such river or river-valley authority must be one established by an existing law or a law made by Parliament. In this connection, it may be mentioned that under LIST I, Entry 56 the regulation and development of inter-State rivers and river-valleys under the control of the Union constitute a Union subject of legislation. The restriction on the State power of taxation contained in this article is comparable to the Doctrine of Immunity of Instrumentalities developed under the American Constitution; (see ART. 246 NOTE 13).

The restriction under this article is not an absolute one in the same way as the restriction under ART. 287 in respect of State taxation of electricity, consumed by or sold to the Union Government or Railways, is not an absolute one. The restriction is a qualified one and is to the effect that except as may be otherwise provided by order by the President, a State law shall not levy or authorise the levy of a tax in respect of the matters mentioned.

Another feature of the restriction is that it refers to both pre-Constitution as well as post-Constitution laws. As regards pre-Constitution laws, cl. (1) provides that no such laws shall impose the taxes mentioned except in so far as the President may by order otherwise provide. As regards post-Constitution laws, cl. (2) provides that such laws will not have effect unless they have been reserved for the consideration of the President and received his assent. The President's assent is also made necessary for rules and orders as to rates and other incidents of such taxes under the State laws.

Exemption of property and income of a State from Union taxation.

289. (1) The property and income of a State shall be exempt from Union taxation.

(2) Nothing in clause (1) shall prevent the Union from imposing, or authorising the imposition of, any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith.

(3) Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by law declare to be incidental to the ordinary functions of government.

GOVERNMENT OF INDIA ACT, 1935.

For text of S. 155, which corresponded to ART. 289, see NOTE 1.

JAMMU AND KASHMIR

Article 289 applies to the State of Jammu and Kashmir. — The Constitution (Application to Jammu and Kashmir) Order. 1954 (14-5-1954).

COGNATE PROVISIONS

State — Meaning of, see ART. 264 (b).
Taxation—Interpretation of, see ART. 366 (28).

Synopsis

1. Analogous law.
    - (a) Government of India Act, 1935.
    - (b) United States of America.
    - (c) Australia.
    - (d) Canada.
    - (e) England.
2. Scope of the article.
3. Trade or business carried on by a State.

1. Analogous law.

(a) Government of India Act, 1935.

(a) Government of India Act, 1935.

"**155.** (1) Subject as hereinafter provided, the Government of a Province and the Ruler of a Federated State shall not be liable to Federal taxation in respect of lands or buildings situate in British India or income accruing, arising or received in British India:

Provided that—

(a) Where a trade or business of any kind is carried on by or on behalf of the Government of a Province in any part of British India outside that Province or by a Ruler in any part of British India, nothing in this sub-section shall exempt that Government or Ruler from any Federal taxation in respect of that trade or business, or any operations connected therewith, or any income arising in connection therewith, or any property occupied for the purposes thereof;

(b) nothing in this sub-section shall exempt a Ruler from any Federal taxation in respect of any lands, buildings or income being his personal property or personal income.

(c) Nothing in this Act affects any exemption from taxation enjoyed as of right at the passing of this Act by the Ruler of an Indian State in respect of any Indian Government securities issued before that date."

(b) United States of America : See Art. 285 Note 1.

(b) United States of America.

(c) Australia.

(c) Australia.

Section 114 of the Australian Constitution enacts a rule of mutual exemption from taxation by the Commonwealth and the States —See Article 285, Note 1.

(d) Canada.

(d) Canada.

Section 125 of the Canadian Constitution exempts from taxation lands or property belonging to the Dominion or to any Province—See Article 285, Note 1.

(e) England.

(e) England.

As pointed out in NOTE 1 on ART. 285, there is no question of any mutual exemption from taxation as between the Centre and the units in England as there is no federal government there and the Constitution is a unitary one. Nevertheless, it may be noted that the general principle observed there is that Crown property is exempt from taxation[1] unless rendered liable expressly or by necessary implication. See ART. 285, NOTE 1.

Article 289 — Note 1

[1] (1883) 9 App Cas 61 (67, 74) : 53 L J Q B 239, *Coomber* v. *Justices of Berks*. (Income-tax not payable on buildings occupied by Courts and Police.)

2. Scope of the article. — This article is the counterpart of ART. 285, which relates to the exemption of the Union Government from State taxation. Under this article, the State is exempt from Union taxation in regard to its property and income.

As seen in ART. 285, NOTE 1, it is the usual system in Federal Constitutions to exempt the Governments of the Units from federal taxation and *vice versa*. This principle was observed in the Government of India Act, 1935, and has also been enacted in this Constitution in this article and ART. 285.

Comparing this article with the corresponding S. 155 of the Government of India Act, 1935, the following points of difference may be noted :

(i) Section 155 of the Government of India Act, 1935, granted exemption from federal taxation only in respect of lands or buildings, whereas under this article the exemption from taxation extends to all property, so that movable property is also covered by the exemption.

(ii) Under the Government of India Act, 1935, S. 155, Proviso (a) the liability of the Province to income-tax in respect of trade and business carried on by it applied only to trade and business carried on outside its territory but not to trade and business carried on within its own territory. But under this article, clause (2), the State is liable to pay income-tax in respect of trade or business carried on whether the trade or business is carried on within the State or outside.

(iii) Clause (3) of the article as to exemption from income-tax in respect of trade or business carried on as incidental to ordinary Governmental functions is new. Under the Government of India Act, 1935, this distinction between trade or business carried on as incidental to ordinary governmental functions and trade or business not carried on by a State Government as incidental to its normal governmental functions was not recognised. But the distinction made was between trade or business carried on within the Province and trade or business carried on outside the Province. In the former case, the Provincial Government was exempt from income-tax; in the latter it was not.

The article may also be compared with ART. 285, and the following points of difference may be noted :

(i) Article 285 only exempts the property of the Union from State taxation. There is no reference to exemption from income-tax. This is obviously because income-tax is a Union subject.

(ii) Article 285 refers not only to the taxation by the State but also by any authority within a State.[1] This also seems to be due to the fact that local government is a State subject.

It will be seen that the exemptions from taxation under ART. 285 and this article only relate to the mutual relations between the Centre and the units. There is no similar exemption from taxation as between the States *inter se*.

3. Trade or business carried on by a State. — The general exemption from Union taxation conferred on the State Government in respect of its property and income, does not apply to taxation in respect of trade or business carried on by State Government.[1a] But cl. (3) enacts an exception to this exception, namely, that where the trade or business is carried on as incidental to normal governmental functions by the State, there will be no liability to Union taxation in respect of such trade or business. But in order that the exemption under cl. (3) may apply, the Parliament must have by law declared the trade or business carried on by the State to be incidental to its normal governmental functions. Otherwise, under cl. (2), the State Government will be liable to Union taxation in respect of trade or business carried on by it.

Clauses (2) and (3) clearly indicate that the carrying on of trade or business by a State is not unconstitutional.[1] See ART. 53, NOTE 6. It is also clear that there is a distinction between trade or business carried on as incidental to the normal governmental functions of the State and other kinds of trade or business carried on by a State Government. The fact that, in order that trade or business may be recognised as incidental to the normal governmental functions of the State, a Parliamentary enactment to that effect is necessary, does not

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Article 289 — Note 2

[1] *See* 1955 Cal 282 (283) [(S) AIR V 42 C 78] : 1955 Cri L Jour 792 (DB). *Calcutta Corporation* v. *Director of Rationing*. (State property is exempt from Union taxation only and not from taxation by any authority within the State.)

Article 289 — Note 3

[1a] *See* ('69) 5 Bom H C R (App) 1 (13), *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State*. (Observations as regards private persons being placed at a disadvantage if Government trading was not liable to same laws.)

[1] 1955 S C 549 (557) [(S) AIR V 42 C 84] : (1955) 2 S C R 225 (SC), *Ram Jawaya* v. *State of Punjab*. (Printing and publishing business — No specific legislative enactment necessary for the purpose.)
1951 All 237 (267, 271) (Prs 47, 69) [AIR V 38 C 51] : ILR (1951) 1 All 269 (FB). *Motilal* v. *Uttar Pradesh Government*.
1956 Pepsu 3 (5) (Prs 7, 8) [(S) AIR V 43 C 2], *Peoples Bus Service* v. *State*. (Motor transport business — No specific legislative enactment necessary for the purpose.)

mean that such Parliamentary enactment is necessary to empower a State to carry on trade or business.[2]

The distinction between the normal governmental functions of the State and its functions when it is merely carrying on trade or business has been discussed in the undermentioned American cases,[3] which may be consulted on this point. The observations of Frankfurter, J., in *State of New York* v. *United States*[4] may be quoted here :

> "That there is a constitutional line between the State as government and the State as trader, was still more recently made the basis of a decision sustaining a liquor tax against Ohio. 'If a State chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function . . . . When a State enters the market place seeking customers, it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned.' *Ohio* v. *Helvering*.[5] . . . . . . If in its wisdom a State

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[2] 1955 Nag 177 (179) (Pr 9) [(S) AIR V 42 C 41] : ILR (1955) Nag 459 (DB), *Kesheoprasad* v. *State of Madhya Pradesh.*

[3] (1946) 90 Law Ed 326 (333) : 326 U S 572, *State of New York* v. *United States.*

(1905) 199 U S 437 (463) : 50 Law Ed 261, *South Carolina* v. *United States*, (*Brewer J.*—"Now, if it be well established, as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognised when we are asked to limit the full power of imposing excises granted to the national Government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that, while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet, whenever a State engages in a business which is of a private nature, that business is not withdrawn from the taxing power of the nation.)

(1896) 40 Law Ed 903 (915) : 162 U S 91 (127), *Central Pacific Railroad Company* v. *State of California.* (State franchise of one of the Pacific railroad companies is not destroyed by or merged in the Federal franchises granted by the acts of Congress, so as to preclude the States from taxing the corporation upon the franchise derived from the State.)

(1870) 19 Law Ed 792 (798, 799) : 9 Wall 579, *Thomson* v. *Union Pacific Railroad Company.* (A railroad constructed under the direction and authority of congress for the uses and purposes of the United States, is not exempt from taxation under State authority in the absence of any legislation by Congress to that effect. A State corporation has no right to hold its property exempt from State taxation.)

[4] (1946) 90 Law Ed 326 (333) : 326 U S 572.

[5] (1934) 78 Law Ed 1311 : 292 U S 371.

engages in the liquor business and may be taxed by Congress as others engaged in the liquor business are taxed, so also Congress may tax the States when they go into the business of bottling water as others in the mineral water business are taxed even though a State's sale of its mineral waters has relation to its conservation policy."

See also the observations of Sir Barnes Peacock C. J., in *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India.*[6]

Adjustment in respect of certain expenses and pensions.

290. Where under the provisions of this Constitution the expenses of any court or Commission, or the pension payable to or in respect of a person who has served before the commencement of this Constitution under the Crown in India or after such commencement in connection with the affairs of the Union or of a State, are charged on the Consolidated Fund of India or the Consolidated Fund of a State, then, if—

(*a*) in the case of a charge on the Consolidated Fund of India, the court or Commission serves any of the separate needs of a State, or the person has served wholly or in part in connection with the affairs of a State; or

(*b*) in the case of a charge on the Consolidated Fund of a State, the court or Commission serves any of the separate needs of the Union or another State, or the person has served wholly or in part in connection with the affairs of the Union or another State,

there shall be charged on and paid out of the Consolidated Fund of the State or, as the case may be, the Consolidated Fund of India or the Consolidated Fund of the other State, such contribution in respect of the expenses or pension as may be agreed, or as may in default of agreement be determined by an arbitrator to be appointed by the Chief Justice of India.

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[6] ('69) 5 Bom H C R (App) 1 (13). (Sir Barnes Peacock points out the necessity of subjecting Government to same laws as private individuals, when Government engages in trade and business.)

GOVERNMENT OF INDIA ACT, 1935

"**156.** Where under the provisions of this Act the expenses of any court or commission, or the pension payable to or in respect of a person who has served under the Crown in India, are charged on the revenues of the Federation or the revenues of a Province, then if —

(a) in the case of a charge on the revenues of the Federation the court or commission serves any of the separate needs of a Province, or the person has served wholly or in part in connection with the affairs of a Province; or

(b) in the case of a charge on the revenues of a Province, the court or commission serves any of the separate needs of the Federation or another Province, or the person has served wholly or in part in connection with the affairs of the Federation or another Province,

there shall be charged on and paid out of the revenues of the Province or, as the case may be, the revenues of the Federation or of the other Province, such contribution in respect of the expenses or pension as may be agreed, or as may in default of agreement be determined by an arbitrator to be appointed by the Chief Justice of India."

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, ART. 290 shall be omitted. — The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Commencement of this Constitution—Meaning of—This Constitution came into force on 26-1-1950—See Art. 394.

Consolidated Fund of India or State—Formation of, see Art. 266.

Pension—Interpretation of, see Art. 366 (17).

State—Meaning of, see Art. 264 (b).

1. Scope of the article.—This article deals with the adjustment of certain expenses between the Union and the States and between the States *inter se*, just as ART. 270 and some other articles deal with the question of distribution of the proceeds of income-tax and certain other taxes between the Union and the States.

The items of expenditure dealt with by this article are : (i) Expenses of a court or commission. (ii) Pension payable to certain persons.

The pensions referred to above fall into two categories : (a) Pensions payable to persons, who, before the commencement of the Constitution, served under the Crown in India, and (b) pensions payable to persons who, after the Constitution, have served in connection with the affairs of the Union or of any State.

In order that this article may apply the above items of expenditure must be charged on the Consolidated Fund of India or of a State. As to the definition of Consolidated Fund of India or of a State, see ART. 266 and the notes thereunder. As to the amounts charged on the Consolidated Fund of India, see ART. 112 and the commentary thereon, and as to the amounts charged on the Consolidated Fund of a State, see ART. 202.

As regards the adjustment of the above expenses, the article provides as follows :

Firstly, with regard to the items charged on the Consolidated Fund of India, if the expenses have been incurred in connection with the separate needs of a State or the person to whom the pension is payable has served the affairs of a State, the State must make a contribution, which contribution must be charged on and paid out of the Consolidated Fund of the State.

Secondly, in the case of items charged on the Consolidated Fund of a State, if the expenses have been incurred in connection with the separate needs of the Union or another State, or the person to whom the pension is payable has served the affairs of the Union or of another State, then a contribution must be made by the Union or the other State, as the case may be, and such contribution must be charged on and paid out of the Consolidated Fund of the Union or of the other State.

The amount of the contribution above referred to is to be fixed by agreement between the parties. In default of such agreement, it is to be determined by an arbitrator to be appointed by the Chief Justice of India.

Privy purse sums of Rulers.

291. (1) Where under any covenant or agreement entered into by the Ruler of any Indian State before the commencement of this Constitution, the payment of any sums, free of tax, has been guaranteed or assured by the Government of the Dominion of India to any Ruler of such State as privy purse —

(a) such sums shall be charged on, and paid out of, the Consolidated Fund of India; and

(b) the sums so paid to any Ruler shall be exempt from all taxes on income.

(2) Where the territories of any such Indian State as aforesaid are comprised within a State specified in Part A or Part B of the First Schedule, there shall be charged on, and paid out of, the Consolidated Fund of that State such contribution, if any, in respect of the payments made by the Government of India under clause (1) and for such period as may, subject to any agreement entered into in that behalf under clause (1) of Article 278, be determined by order of the President.

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, ART. 291 shall be omitted.—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Rights and privileges of Rulers of Indian States—See Art. 362.

Clause (1)—Agreement to be entered into by the Government of India with a Part B State relating to the contribution by such State in respect of the privy purse sums of the Ruler of the Indian State—See Art. 278 (1) (c).

Clause (1)—Indian State—Interpretation of, see Art. 366 (15).

Clause (1)—Ruler—Interpretation of, see Art. 366 (22).

Clause (1)—Tax—Interpretation of, see Art. 366 (28).

Clause (1) (a)—Consolidated Fund of India—Formation of, see Art. 266.

Clause (1) (b)—Taxes on income—Interpretation of, see Art. 366 (29).

Clause (2)—Art. 278 deals with agreement with Part B States with regard to certain financial matters.

1. Scope of the article.—This article deals with the payment of the "privy purse" of the former Rulers of the Indian States which were "integrated" into the Indian Union. Agreements were entered into between the Dominion of India and such Rulers under which, in consideration of their surrender of their rights and powers and their agreeing to have their States merged in the Indian Union, a certain sum was made payable to each of them as "privy purse." It was also agreed that the sum paid to them as "privy purse" must be free from income-tax.

Under this article, provision is made for three matters in connection with the privy purse of the former Rulers of the Indian States; (i) the payment of the privy purse out of the Consolidated Fund of India and its being *charged* on such Fund; (ii) the exemption of the payment from income-tax; (iii) the contribution to be made in respect of such payment by the Part A or Part B State in which the territory of the former Ruler has been merged. The amount of the contribution and the period during which the contribution is to be made are to be determined by the President by order, subject to any agreement that may be made between the Centre and the State under ART. 278 (1) (c).

For definition of "Indian State", see ART. 366 (15) and for definition of "Ruler of Indian State" see ART. 366 (22).

CHAPTER II.—BORROWING

Borrowing by the Government of India.

292. The executive power of the Union extends to borrowing upon the security of the Consolidated Fund of India within such limits, if any, as may from time to time be fixed by Parliament by law and to the giving of guarantees within such limits, if any, as may be so fixed.

GOVERNMENT OF INDIA ACT, 1935

For text of S. 162, which corresponded to ART. 292, see NOTE 1.

JAMMU AND KASHMIR

Article 292 applies to the State of Jammu and Kashmir.—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Borrow—Interpretation of, see ART. 366 (4).
Consolidated Fund of India—Formation of, see ART. 266.
Guarantees—Interpretation of, see ART. 366 (13).

Synopsis

1. Analogous law.
    - (a) Government of India Act, 1935.
    - (b) United States of America.
    - (c) Canada.
    - (d) Australia.
2. Scope.

1. Analogous law.

(a) Government of India Act, 1935.

(a) Government of India Act, 1935.

"**162.** Subject to the provisions of Part XIII of this Act with respect to borrowing in sterling, the executive authority of the Federation extends to borrowing upon the security of the revenues of the Federation within such limits, if any, as may from time to time be fixed by Act of the Federal Legislature and to the giving of guarantees within such limits, if any, as may be so fixed."

(b) United States of America.

(b) United States of America.

Article I, S. 8 (2) of the United States Constitution confers on the Congress the power to borrow money on the credit of the United States.

(c) Canada.

(c) Canada.

Section 91 (4) of the British North America Act, 1867, confers on the Parliament of Canada exclusive legislative authority in regard to the borrowing of money on public credit. Under S. 92 (3) of the same Act, the Legislature of the province has exclusive legislative power in regard to the borrowing of money on the sole credit of the province.

(d) Australia.

(d) Australia.

Under S. 51 (iv) of the Commonwealth of Australia Constitution Act, 1900, the Parliament has power to make laws with respect to borrowing money on the public credit of the Commonwealth.

2. Scope.—This article confers on the Government of India the power of borrowing money on the security of the Consolidated Fund of India. It will be seen that under the Constitutions of United States, Canada and Australia, the power of borrowing on the public credit is vested in the Legislature (i. e., the Government will require the authority of the Legislature for the purpose). (See NOTE 1.) Under this article and ART. 293, the power of borrowing on public credit has been vested in the *Executive*, and the authority of the Legislature is not indispensable. This was also the position under the corresponding S. 162 of the Government of India Act, 1935. But the power is to be exercised subject to the limitations, if any, that may be imposed by Parliament by law. Under SCH. VII LIST I Entry 35, Parliament has exclusive legislative power with respect to the public debt of the Union.

This article also confers on the Central Executive the power to give guarantees within the limits, if any, fixed by Parliament by law. Thus, the Government of India may guarantee loans raised by State Governments (ART. 293).

Under ART. 293, States can only borrow within the limits of the territory of India. There is no such limit on the borrowing power of the Union.

Borrowing by States.

293. (1) Subject to the provisions of this article, the executive power of a State extends to borrowing within the territory of India upon the security of the Consolidated Fund of the State within such limits, if any, as may from time to time be fixed by the Legislature of such State by law and to the giving of guarantees within such limits, if any, as may be so fixed.

(2) The Government of India may, subject to such conditions as may be laid down by or under any law made by Parliament, make loans to any State or, so long as any limits fixed under Article 292 are not exceeded, give guarantees in respect of loans raised by any State, and any sums required for the purpose of making such loans shall be charged on the Consolidated Fund of India.

(3) A State may not without the consent of the Government of India raise any loan if there is still outstanding any part of a loan which has been made to the State by the Government of India or by its predecessor Government, or in respect of which a guarantee has been given by the Government of India or by its predecessor Government.

(4) A consent under clause (3) may be granted subject to such conditions, if any, as the Government of India may think fit to impose.

GOVERNMENT OF INDIA ACT, 1935

For text of S. 163, which corresponded to ART. 293, see NOTE **1.**

JAMMU AND KASHMIR

Article 293 applies to the State of Jammu and Kashmir.— The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

State—Meaning of, see ART. 261 (b).
Clause (1)—Borrowing—Interpretation of, see ART. 366 (4).
Clause (1)—Consolidated Fund of the State—Formation of, see ART. 266.
Clause (1)—Guarantees—Interpretation of, see ART. 366 (13).
Clause (2)—Loan—Interpretation of, see ART. 366 (4).

Synopsis

1. Analogous law.
   (a) Government of India Act, 1935.
2. Scope of the article.

1. Analogous law.

(a) Government of India Act, 1935.

(a) Government of India Act, 1935.

"**163.** (i) Subject to the provisions of this section, the executive authority of a Province extends to borrowing upon the security of the revenues of the Province within such limits, if any, as may from time to time be fixed by the Act of the Provincial Legislature and to the giving of guarantees within such limits, if any, as may be so fixed.

(ii) The Federation may, subject to such conditions, if any, as it may think fit to impose, make loans to, or, so long as any limits fixed under the last preceding section are not exceeded, give guarantees in respect of loans raised by, any Province and any sums required for the purpose of making loans to a Province shall be charged on the revenues of the Federation.

(iii) A Province may not without the consent of the Federation borrow outside India, nor without the like consent raise any loan if there is still outstanding any part of a loan made to the Province by the Federation or by the Governor-General in Council, or in respect of which a guarantee has been given by the Federation or by the Governor-General in Council.

A consent under this sub-section may be granted subject to such conditions, if any, as the Federation may think fit to impose.

(iv) A consent required by the last preceding sub-section shall not be unreasonably withheld, nor shall the Federation refuse, if sufficient cause is shown, to make a loan to, or to give a guarantee in respect of a loan raised by, a Province or seek to impose in respect of any of the matters aforesaid any condition which is unreasonable, and, if any dispute arises whether a refusal of consent, or a refusal to make a loan or to give a guarantee, or any condition insisted upon, is or is not justifiable, the matter shall be referred to the Governor-General and the decision of the Governor-General in his discretion shall be final."

2. Scope of the article.—This article deals with the borrowing power of the States, just as ART. 292 deals with the borrowing power of the Union. As in the case of the Union, so also in the case of the State, the power of borrowing money is vested in the Executive and legislative authority is not indispensable for the exercise of the power. But the power must be exercised subject to the limits, if any, imposed by the State Legislature.

The borrowing contemplated is on the security of the Consolidated Fund of the State just as borrowing by the Central Government is done on the security of the Consolidated Fund of India.

Under ART. 292, the Government of India may borrow either within India or outside India. But under this article, the State Government can only borrow within the territory of India. Under the Government of India Act, 1935, S. 163, the Provinces were entitled to borrow outside the territory of India with the consent of the Central Government. Under this Constitution the States have no power to borrow outside India at all.

The executive power of the States extends also to the giving of guarantees just as the executive power of the Union extends to the giving of guarantees: see cl. (1). But this power of giving guarantees is also subject to the limits, if any, imposed by law by the State Legislature.

Under cl. (2) of this article, the Government of India may advance loans to a State Government. But this can only be done subject to the limits laid down by law by Parliament.

Though there is thus a provision for the Central Government advancing a loan to a State Government, there does not seem to be any provision in the Constitution for one State advancing a loan to another State or to the Centre.

The Central Government may not only advance a loan to a State Government but may also guarantee the loans borrowed by a State Government. But this power of giving guarantee is also subject to limits laid down by law by Parliament.

Where the Central Government has advanced a loan to a State Government or has guaranteed a loan borrowed by a State Government, so long as any part of such loan is outstanding, the State Government cannot raise any other loan without the consent of the Central Government (cl. 3). Such consent of the Central Government may be given subject to any conditions which the Central Government may think fit to impose.

CHAPTER III.—PROPERTY, CONTRACTS, RIGHTS, LIABILITIES, OBLIGATIONS AND SUITS

Succession to property, assets, rights, liabilities and obligations in certain cases.

294. As from the commencement of this Constitution—

(a) all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of the Dominion of India and all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of each Governor's Province shall vest respectively in the Union and the corresponding State, and

(b) all rights, liabilities and obligations of the Government of the Dominion of India and

of the Government of each Governor's Province, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations respectively of the Government of India and the Government of each corresponding State,

subject to any adjustment made or to be made by reason of the creation before the commencement of this Constitution of the Dominion of Pakistan or of the Provinces of West Bengal, East Bengal, West Punjab and East Punjab.

GOVERNMENT OF INDIA ACT, 1935

"PROPERTY, CONTRACTS, LIABILITIES AND SUITS

"**172.** (1) All lands and buildings which immediately before the commencement of Part III of this Act were vested in His Majesty for the purposes of the Government of India shall as from that date—

(*a*) in the case of lands and buildings which are situate in a province, vest in His Majesty for the purposes of the government of that province unless they were then used, otherwise than under a tenancy agreement between the Governor-General in Council and the Government of that province, for purposes which thereafter will be purposes of the Federal Government or of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, or unless they are lands and buildings formerly used for such purposes as aforesaid, or intended or formerly intended to be so used, and are certified by the Governor-General in Council, or as the case may be, His Majesty's Representative, to have been retained for future use for such purposes, or to have been retained temporarily for the purpose of the more advantageous disposal by sale or otherwise;

(*b*) in the case of lands and buildings which are situate in a province but do not by virtue of the preceding paragraph vest in His Majesty for the purposes of the Government of that province, and in the case of lands and buildings which are situate in India elsewhere than in a province, vest in His Majesty for the purposes of the Government of the Federation or for the purposes of the exercise of the functions of the Crown in its relations with Indian States, according to the purpose for which they were used immediately before the commencement of Part III of this Act ; and

(c) in the case of lands and buildings which are situate elsewhere than in India (except lands and buildings situate in Burma or Aden), vest in His Majesty for the purposes of the Government of the Federation or, if they were immediately before the commencement of Part III of this Act used for purposes of the department of the Secretary of State in Council, for the purposes of His Majesty's Government in the United Kingdom. . . . ."

"**173.** (1) Subject to the provisions of this and the last preceding section, all property vested in His Majesty which by virtue of any delegation from the Secretary of State in Council or otherwise is immediately before the commencement of Part III of this Act in the possession or under the control of, or held on account of, the Governor-General in Council or any Local Government shall, as from the commencement of Part III of this Act, vest in His Majesty—

(a) for the purposes of the Government of the Federation; or

(b) for the purposes of the exercise of the functions of the Crown in its relations with Indian States; or

(c) for the purposes of the Government of a Province,

according as the purposes for which the property was held immediately before the commencement of Part III of this Act will thereafter be purposes of the Government of the Federation, purposes of His Majesty's Representative for the exercise of the said functions of the Crown or purposes of the Government of a Province :

Provided that—

(i) all moneys which immediately before the commencement of Part III of this Act were in the public account of which the Governor-General in Council was custodian shall be vested in His Majesty for the purposes of the Government of the Federation;

(ii) all credits and debits of the Local Government of any Governor's Province (other than Burma) in account with the Governor-General in Council shall be deemed to be credits and debits of the corresponding Province under this Act in account with the Federation.

(2) Subject as aforesaid, all other property vested in His Majesty and under the control of the Secretary of State in Council immediately before the commencement of Part III of this Act shall as from the commencement of Part III of this Act vest in His Majesty for the purposes of the Government of the Federation, for the purposes of the exercise of the functions of the Crown in its relations

1.Ind. Con. S.F. 68.

with Indian States or for the purposes of the Government of a Province, according as the Secretary of State may determine having regard to the circumstances of the case, and the Secretary of State shall have power to and shall deal with the property accordingly.

(3) In this section "property' includes money, securities, bank balances and moveable property of any description . . . ."

JAMMU AND KASHMIR

Article 294 applies to the State of Jammu and Kashmir. — The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Commencement of this Constitution—Meaning of—This Constitution came into force on 26-1-1950—See Art. 394.

"Subject to any adjustment made"—See the Indian Independence (Rights, Property and Liabilities) Order, 1947, made by the Governor-General under Notification No. G. G. O. 18 dated 14-8-1947 published in the Gazette of India, Extra., 14-8-1947, page 913.

Synopsis

1. Analogous law.
   - (a) Canadian Constitution.
   - (b) Government of India Act, 1935.
   - (c) The Indian Independence Act, 1947, and thereafter.
2. Scope of the article.
3. "Rights liabilities and obligations of the Government of the Dominion of India."
4. "Rights, liabilities and obligations of the Government of each Governor's Province."
5. "Subject to adjustment made or to be made by reason of the creation of Pakistan."
6. Crown grants — Power to affect by legislation.
7. Guarantee given to former Indian Rulers.
8. Legislative power of the Central and State Legislatures.
9. Priority of Crown debts — See under Note 2.

1. Analogous law.

(a) Canadian Constitution.

(a) Canadian Constitution.

The British North America Act of 1867 also contains provisions for the allocation of the assets and liabilities of the Provinces before the inauguration of the new Constitution between the Dominion of Canada and the Provinces under the Federation that was brought into existence by the Act—vide Ss. 107 to 117.

The object of the British North America Act was neither to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to create a Federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each Province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the Provinces, all powers, executive and legislative, and all public property and revenues which had previously belonged to the Provinces;

so that the Dominion Government should be vested with such of these powers, property and revenues as were necessary for the due performance of its constitutional functions and that the remainder should be retained by the Provinces for the purposes of Provincial Government.[1]

Thus, whatever proprietary rights were vested in the Provinces at the date of the British North America Act, 1867, remain so vested in them except such as were by its express enactments transferred to the Dominion.[2] Such transfer is not to be presumed from the grant of legislative jurisdiction to the Dominion in respect of the subject matter of those proprietary rights.[3]

The property, although allocated to the Provinces or to the Dominion, was in either case legally vested in the British Crown. The British North America Act, 1867, did not sever the connection between the Crown and the Provinces. The relation between them was the same as that which subsisted between the Crown and the Dominion, in respect of the powers, executive and legislative, and public property and revenues vested in them respectively. In particular, all property and revenues reserved to the Provinces by Ss. 109 and 126 are vested in Her Majesty as sovereign head of each Province.[4]

(b) Government of India Act, 1935.

(b) Government of India Act, 1935.

Sections 172 and 173 of the Government of India Act, 1935, were the corresponding provisions in that Act, dealing with succession to the property vested in the Government which had been in existence previous to the Act.

Article 294 — Note 1

1. (1892) 1892 App Cas 437 (441, 442) : 61 L J P C 75, *Liquidators of the Maritime Bank of Canada* v. *Receiver General of New Brunswick*.

2. (1898) 1898 App Cas 700 (709, 710) : 67 L J P C 90, *Attorney General for the Dominion of Canada* v. *Attorney General for the Provinces of Ontario, Quebec and Novascotia.*

(1892) 1892 App Cas 437 (441, 442) : 61 L J P C 75, *Liquidators of the Maritime Bank of Canada* v. *The Receiver General of New Brunswick.*

3. (1898) 1898 App Cas 700 (709) : 67 L J P C 90, *Attorney General for the Dominion of Canada* v. *Attorney General for the Provinces of Ontario, Quebec and Novascotia.*

4. (1892) 1892 App Cas 437 (441, 442) : 61 L J P C 75, *The Liquidators of the Maritime Bank of Canada* v. *The Receiver General of New Brunswick.* (The Provincial Government of New Brunswick, being a simple contract creditor of the Maritime Bank of the Dominion of Canada in respect of public moneys of the province deposited in the name of the Receiver General of the Province, is entitled to payment in full over the other depositors and simple contract creditors of the bank, its claim being for a Crown debt to which the prerogative attaches.)

(c) The Indian Independence Act, 1947, and thereafter.

(c) The Indian Independence Act, 1947, and thereafter :

The Indian Independence Act, 1947, S. 9, provided *inter alia*, for the division of the property, rights and liabilities of the country between the Dominions of India and Pakistan which were brought into existence by the Act. Clause (b) of S. 9 (1) reads as follows :

"**9.** (1) The Governor-General shall by order make such provision as appears to him to be necessary or expedient —

> (b) for dividing between the new Dominions, and between the new Provinces, to be constituted under this Act, the powers, rights, property, duties and liabilities of the Governor-General in Council or, as the case may be, of the relevant Provinces which, under this Act, are to cease to exist . . ."

In accordance with the above provision, the Indian Independence (Rights to Property and Liabilities) Order, 1947, was passed by the Governor-General.

2. Scope of the article.—This article and ART. 295 deal with a question of succession to the property, assets, rights, liabilities and obligations of the Government which existed before the coming into force of the new Constitution. This article deals with the succession to the assets and liabilities of the Government of the Dominion of India and of the Governments of the Governors' Provinces. That is, the article deals with the succession to the assets and liabilities of the Dominion of India and of the Governments of the Provinces corresponding to Part A States. Article 295 deals with the succession to the assets and liabilities of the Governments of the former Indian States which corresponded to the Part B States.

The question arises as to the succession to the assets and liabilities of the former Indian States which do not correspond to the Part B States as, for instance, Baroda or Bhopal. As regards these States, it must be remembered that the two articles deal with succession to the assets and liabilities of the previous Governments as they were immediately before the commencement of the Constitution. Former Indian States other than those corresponding to Part B States were either absorbed in the neighbouring Province or made into Chief Commissioners' Provinces. In either case, before the commencement of the Constitution the assets and liabilities of such former Indian States had become vested either in the Dominion of India or in the absorbing Province. Hence, there was no question of providing for succession to the assets and liabilities of such former Indian States in the Constitution.

As regards the Chief Commissioners' Provinces other than those brought into existence by the integration of former Indian States, such as Coorg, they being centrally administered areas, there is no question of providing for succession to their assets and liabilities.

Under both this article and ART. 295, the provision as to succession is divided into two clauses. One of them relates to "property and assets" and the other relates to "rights, liabilities and obligations, whether arising out of contract or otherwise."

Under this article the assets and liabilities of the Dominion of India pass to the Government of India, and the assets and liabilities of each of the Governors' Provinces under the Government of India Act, 1935, pass to the corresponding Part A State.

As regards the assets and liabilities of the former Indian States corresponding to Part B States, they do not *en bloc* pass to the corresponding Part B States. Such of the assets and liabilities as relate to purposes which under the new Constitution will be purposes of the Union relating to any of the matters enumerated in the Union List, will pass to the Central Government. The remaining assets and liabilities will pass to the corresponding Part B State. But the above provisions of ART. 295 are subject to any agreement entered into between the Government of India and the Government of the particular former Indian State.

The distribution of property between the Centre and the States is a peculiar characteristic of a federal system of government. Hence, before the Government of India Act, 1935, there was no question of such distribution as the system of government was unitary.[1]

In *Messrs. Builders Supply Corporation* v. *Union of India*[2] the opinion was expressed that "the object of the article appears to be to provide for an adjustment of the properties, rights and liabilities as between the Centre and the Provinces and not to enact a provision for their continuance." Chakravartti, C. J., observed : "It is true that the continuance is referred to necessarily and incidentally but I do not read the article as primarily or directly concerned with the maintenance or continuance of the pre-Constitution rights and liabilities." On the above reasoning, the learned Chief Justice found himself unable to accept the proposition that the article constituted a direct and specific provision by which "all the rights previously enjoyed by the Dominion of India, including the right of priority in regard to Crown debts had devolved upon the Indian Republic." It is submitted with respect that there seems to be no reason to cut down like this, the meaning of the express words of the article. The commentary in the other Notes under this article will clearly show that the article deals not only with the *distribution* of rights and liabilities between the Centre and the Provinces but also with the succession to the rights and liabilities of the former Government.

3. **"Rights, liabilities and obligations of the Government of the Dominion of India."**—As seen in NOTE 2, the rights, liabilities

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Article 294 — Note 2

[1] 1943 F C 13 (14, 15) [AIR V 30] (FC), *In re Ref. under S. 213, Government of India Act, 1935.*

[2] 1956 Cal 26 (31) (Pr 13) [(S) AIR V 43 C 9] (DB).

and obligations which, immediately before the present Constitution, were the rights, liabilities and obligations of the Government of the Dominion of India, will devolve, under this article, on the Government of India. Under this provision, the liabilities and obligations which were originally incurred by the Central Government prior to the Indian Independence Act, 1947 and which subsequently devolved on the Central Government under the appropriate orders passed by the Governor-General under S. 9 of the Indian Independence Act, 1947, would devolve on the Central Government.[1]

This article makes it indisputable that all rights of the King remain rights of the Government of India.

Where, therefore, the surety bonds of certain persons under the Criminal Procedure Code were executed in 1948, the contention that the undertaking was to pay the penalty to the King-Emperor and since, with the coming into force of the Constitution, the King Emperor has ceased to be the Sovereign, no forfeiture of the bonds was now possible, was not tenable.[2]

4. **"Rights, liabilities and obligations of Government of each Governor's Province."** — The obligations under a merger agreement entered into with the Ruler of a former Indian State by the Dominion of India was entered into on behalf of the absorbing Province and hence is binding under cl. (b) of this article on the corresponding State. Thus, for instance, where a merger agreement was entered into between the Dominion of India and the Rulers of certain States which were absorbed in the Province of Bombay, the agreement must be deemed to be made on behalf of the Province of Bombay and the obligations thereunder will be binding on the Province of Bombay and, by virtue of the rule of succession enacted in cl. (b) of this article, on the State of Bombay.[1]

Article 294 — Note 3

[1] 1955 N U C (Cal) 2912 [AIR V 42], *Union of India* v. *Seth Mulchand.* (Agreement containing arbitration clause — Arbitration clause is binding on successor Government.)

1952 Cal 140 (140) (Prs 2, 4) [AIR V 39 C 5], *Union of India* v. *Lokenath Saha.* [*See also* 1951 S C 23 (25) (Pr 5) [A I R V 38 C 8] : 1951 S C R 1 : I L R (1951) Hyd 372 : ILR (1952) 1 Cal 119 (SC), *State of Tripura* v. *East Bengal.* (The Orders promulgated on 14-8-1947 by the Governor-General of India before the partition in exercise of the powers conferred under S. 9, and containing provisions specially designed to remove the difficulties arising in connection with the transition to the new situation created by the partition are binding on both the Dominion of India and the Dominion of Pakistan. Among such Orders are the Indian Independence (Legal Proceedings) Order, 1947, and the Indian Independence (Rights, Property and Liabilities) Order, 1947 : AIR 1949 F C 143 (FC), *Foll.*; ('49) 53 Cal W N 368, *Affirmed.*)]

[2] 1955 N U C (All) 4433 [AIR V 42], *Premchand* v. *The State.*

Article 294 — Note 4

[1] *See* 1955 S C 540 (545) [(S) AIR V 42 C 83] : (1955) 2 S C R 164 (SC), *Umeg Singh* v. *State of Bombay.*

5. "Subject to adjustment made or to be made by reason of the creation of Pakistan." — The last part of this article expressly provides that, in determining the property, assets, rights, liabilities and obligations of the Government immediately before the commencement of the present Constitution, the adjustments made or to be made under the Orders of the Governor-General passed under S. 9 of the Indian Independence Act of 1947, should be taken into account.[1]

6. Crown grants — Power to affect by legislation. — It is an established principle that the doctrine of derogation from a grant cannot be applied in the case of grant by the Crown so as to deprive it of its paramount right to legislate in respect of the subject-matter.[1] This principle is also applicable to the construction of this article. Hence, the liabilities and obligations, which devolve on the successor Government under this article, are subject to the legislative power of the Legislatures. Thus, prior to 26th January 1950 (the commencement of the Constitution), the rights of taluqdars in Oudh in land granted to them under a sanad were subject to such laws as might from time to time be passed by an Indian Legislature, acting within its appropriate field. Clause (b) of this article does not alter the position. The effect of the article is merely to declare that rights, liabilities and obligations of the Government of the Dominion of India and of each Governor's Province shall devolve respectively on the present Government of India and on the Government of each corresponding State. The effect of cl. (b) of this article is not to confirm for ever the rights of taluqdarrs in land granted to them by the British Government.[2]

See also ART. 31 NOTE 25 (k) and (l) and NOTE 27.

Article 294 — Note 5

[1] *See* 1950 Cal 463 (465) (Pr 4) [AIR V 37 C 173] : I L R (1951) 1 Cal 654 (DB) *Iswar Madan Gopal* v. *Province of West Bengal.* (Where, at the time of the partition of Bengal, certain proceedings for compensation for land acquired in the district of Burdwan were pending before the District Judge at Burdwan and the land has fallen within the Province of West Bengal in the partition, the liability to pay compensation is on that Province and as the State of West Bengal represents that Province under the Constitution the proceedings must continue against that State.)

1950 Cal 159 (160) [A I R V 37 C 50] (DB), *Province of West Bengal* v. *Midnapore Zemindary Co.* (Indian Independence Order (1947), Arts. 8 (2), 9—Where a hospital which was housed in a house situate in Murshidabad district which was allotted on partition to West Bengal served the residents of that district the rent of the house which had accrued due before partition of Bengal and which was payable by the old province of Bengal became, under Art. 8 (2), payable by the Province of West Bengal.)

Article 294 — Note 6

[1] (1931) 99 LJ Ch 483 (489):(1931) 1 Ch 169, *North Charterland Co.* v. *The King.*

[2] 1951 All 674 (692) (Pr 92) [AIR V 38 C 182] : I L R (1952) 2 All 46 (F B), *Suryapal Singh* v. *U. P. Government.*

7. Guarantee given to former Indian Rulers. — The obligations under the agreements entered into with the Rulers of former Indian States, which were integrated into the Indian Union, would be covered by cl. (2) of this article and would devolve on the Government of India or the respective State Governments. But these obligations cannot by themselves fetter the legislative power of the Central or the State Legislature with regard to any subject which falls within their legislative jurisdiction. Thus, the guarantee given to a former Indian Ruler in regard to the ownership of Jagirs granted by such Ruler would not affect the power of the State Legislature to make a law abolishing jagirs.[1] In *Umeg Singh* v. *State of Bombay*[2] the Supreme Court observed as follows :

> "The Constitution itself laid down the fetters or limitations on this power, e. g., in ART. 303 or ART. 286 (2). But unless and until the Court came to the conclusion that the Constitution itself had expressly prohibited legislation on the subject either absolutely or conditionally the power of the State Legislature to enact legislation within its legislative competence was plenary. Once the topic of legislation was comprised within any of the entries in the Lists 2 and 3 of the Seventh Schedule to the Constitution the fetter or limitation on such legislative power had to be found within the Constitution itself and if there was no such fetter or limitation to be found there the State Legislature had full competence to enact the impugned Act no matter whether such enactment was contrary to the guarantee given, or the obligation undertaken by the Dominion Government or the Province of Bombay or even the State of Bombay."

It may be noted that where the guarantee given to a former Indian Ruler is intended to restrict legislative power or taxing power of the Legislature, an appropriate provision is made in the Constitution itself, as, for instance, under ART. 291 (2), where exemption from income-tax has been enacted in regard to the privy purse of the former Rulers of Indian States. See also Article 362.

Apart from the fact that in the absence of an appropriate provision in the Constitution, the agreements entered into with former Rulers of Indian States by the Dominion of India in connection with the integration of such States into the Indian polity, cannot affect the legislative power of the Centre or State Legislatures to make laws on the subjects within their legislative jurisdiction, alleged

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Article 294 — Note 7

[1] 1955 S C 540 (547) [(S) A I R V 42 C 83] : 1955-2 S C R 164 (SC), *Umeg Singh* v. *State of Bombay.* (Bombay Merged Territories and Areas (Jagirs Abolition) Act (39 of 1954) is *intra vires.*)

[2] 1955 S C 540 (547) (Pr 13) [(S) AIR V 42 C 83] : (1955) 2 S C R 164 (SC).

breaches of the agreements cannot be made the subject of legal proceedings before the Courts of the land—See ART. 363.

See also ART. 31 NOTE 25 (k) and (l) and NOTE 27.

8. Legislative power of the Central and State Legislatures. — It has already been seen in NOTE 7 that the fact that an obligation devolves on the Central Government or the State Government under this article does not, in the absence of an appropriate provision in the Constitution, fetter the legislative power of the Central or State Legislatures to make laws on the subjects within their legislative jurisdictions.[1]

The fact that under this article the proprietary right in the subject-matter is vested in the Union does not necessarily mean that the legislative power with respect to such matter is also vested in the Union. Such legislative power may be vested in the State Legislature.[2]

Conversely, the fact that legislative jurisdiction with regard to a certain subject-matter is conferred on the Central Legislature will not mean that the proprietary right is also vested in the Central Government.[3]

The above principles will also apply *mutatis mutandis* to State Government and State Legislature. In *Attorney-General for the Dominion of Canada* v. *Attorney-General for the Provinces of Ontario, Quebec and Nova Scotia*,[4] the Judicial Committee of the Privy Council observed as follows :

> "It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it."

Article 294 — Note 8

[1] 1955 S C 540 (547, 548) [(S) AIR V 42 C 83] : (1955) 2 S C R 161 (S C), *Umeg Singh* v. *State of Bombay.*

[*See* 1946 P C 127 (130, 131) (Prs 16, 19) [A I R V 33 C 40] : 73 Ind App 123 : 1946 F C R 111 : I L R (1946) Kar P C 129 (PC), *Jagannath Baksh* v. *United Provinces.*]

[2] 1954 Mad 291 (301) [AIR V 41 C 125] : I L R (1953) Mad 1175 (D B), *A. M. S. S. V. M. and Co.* v *State of Madras.* (Entry 21 in State List "Fisheries" is sufficient to clothe State Legislature with powers to enact laws in respect of fisheries in territorial waters, notwithstanding that they vested in the Union.)

[3] (1898) 1898 App Cas 700 (709) : 67 L J P C 90, *Attorney General for the Dominion of Canada* v. *Attorney General for the Provinces of Ontario Quebec and Nova Scotia.*

[4] (1898) 1898 App Cas 700 (709) : 67 L J P C 90.

But the above general principles are subject to express provisions in the Constitution. Thus, under LIST 1, Entry 32, the Union Legislature has exclusive legislative power with regard to the property of the Union and the revenue therefrom. But as regards property of the Union situated in a Part A or Part B State, the legislation by the Union will be subject to the legislation by the State save in so far as Parliament by law otherwise provides.

9. **Priority of Crown debts** — See under NOTE 2.

Succession to property, assets, rights, liabilities and obligations in other cases.

295. (1) As from the commencement of this Constitution—

(*a*) all property and assets which immediately before such commencement were vested in any Indian State corresponding to a State specified in Part B of the First Schedule shall vest in the Union, if the purposes for which such property and assets were held immediately before such commencement will thereafter be purposes of the Union relating to any of the matters enumerated in the Union List, and

(*b*) all rights, liabilities and obligations of the Government of any Indian State corresponding to a State specified in Part B of the First Schedule, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations of the Government of India, if the purposes for which such rights were acquired or liabilities or obligations were incurred before such commencement will thereafter be purposes of the Government of India relating to any of the matters enumerated in the Union List,

subject to any agreement entered into in that behalf by the Government of India with the Government of that State.

(2) Subject as aforesaid, the Government of each State specified in Part B of the First Schedule shall, as from the commencement of this Constitution, be the successor of the Government of the corresponding Indian State as regards all property and assets and all rights, liabilities and obligations, whether arising out of any contract or otherwise, other than those referred to in clause (1).

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in Art. 295, references to the commencement of the Constitution shall be construed as references to the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954.—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Commencement of this Constitution—Meaning of—This Constitution came into force on 26-1-1950—See ART. 394.

Indian State — Interpretation of, see ART. 366 (15).

Union List — Meaning of, see ART. 246 (1).

1. Scope of the article.—This article relates to the succession to the assets and liabilities of the former Indian States which became Part B States under this Constitution. The principle enacted is that where the assets and liabilities related to purposes which under the Constitution are purposes of the Union relating to matters enumerated in the Union List, then the assets and liabilities would pass to the Government of India. In other cases, the assets and liabilities would pass to the corresponding Part B State. The provisions of the article are subject to any agreement entered into in that behalf by the Government of India with the Government of the particular State. Thus, although the financial obligations in connection with the maintenance of the armed forces would fall under the Union List, Entry 2, and hence under cl. (1) (b) of the article would devolve on the Union Government, such obligations might continue to rest on the State Government, if there should be an agreement between the State Government and the Government of India to that effect.[1]

This article has to be read along with ART. 277. Article 277 allows duties to be levied for the purposes of the State even though such duties may be mentioned in the Union List, till such time as Parliament provides by law to the contrary. Till Parliament makes

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Article 295 — Note 1

[1] *See* 1953 Madh B 257 (259) (Pr 15) [AIR V 40 C 99] : I L R (1954) Madh B 211 (F B), *Madhaorao Ramrao* v. *State of Madhya Bharat*. (Allowances to irregular State forces.)

such a law, the arrears of duties leviable by a State under ART. 277 would not be assets held for purposes which under the Constitution are purposes of the Union. The reason is that even assuming that arrears of duties are "assets" within the meaning of ART. 295 (1) (a), inasmuch as ART. 277 allows them to be realized for the purposes of the State until Parliament provides by law to the contrary, the assets cannot be said to be held for purposes which from the commencement of the Constitution are purposes of the Union, even though the duties in question may be covered by the Union List.[2]

Where a Part B State is sought to be foisted with a liability which was previously incumbent upon an Indian State, the Part B State cannot be made liable for any amount in excess of that for which the Indian State would have been liable.[3]

See also Notes on ART. 294.

Property accruing by escheat or lapse or as *bona vacantia.*

296. Subject as hereinafter provided, any property in the territory of India which, if this Constitution had not come into operation, would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as *bona vacantia*[a] for want of a rightful owner, shall, if it is property situate in a State, vest in such State, and shall, in any other case, vest in the Union :

Provided that any property which at the date when it would have so accrued to His Majesty or to the Ruler of an Indian State was in the possession or under the control of the Government of India or the Government of a State shall, according as the purposes for which it was then used or held were purposes of the Union or of a State, vest in the Union or in that State.

Explanation. — In this article, the expressions " Ruler" and "Indian State" have the same meanings as in Article 363.

[a] *Bona vacantia.* — Things found without any apparent owner. Those things in which nobody claims property.

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[2] 1953 Raj 145 (148) (Pr 9) [A I R V 40 C 51] : I L R (1953) 3 Raj 123 (FB), *Maharaja Kishangarh Mills Ltd.* v. *Union of India.*

[3] 1953 Sau 21 (24) (Pr 8) [A I R V 40 C 12] (D B), *Somchand Karmchand* v. *State of Saurashtra.*

GOVERNMENT OF INDIA ACT, 1935

For text of S. 174, which corresponded to ART. 296, see NOTE 1.

JAMMU AND KASHMIR

Article 296 applies to the State of Jammu and Kashmir.—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Indian State — Interpretation of, see Explanation to this article and Art. 363 (2).

Ruler—Interpretation of, see Explanation to this article and Art. 363 (2).

State—Meaning of, see Art. 264 (b).

Synopsis

1. Analogous law.
   - (a) Government of India Act, 1935.
   - (b) Canada.
2. Scope of the article.
3. Escheat.
4. Bona vacantia.
5. Situs of property.

1. Analogous law.

(a) Government of India Act, 1935 :

(a) Government of India Act, 1935.

Section 174 was a corresponding provision in the Government of India Act, 1935. The section ran as follows :

> "174. Subject as hereinafter provided, any property in India accruing to His Majesty by escheat or lapse, or as *bona vacantia* for want of a rightful owner, shall, if it is property situate in a Province, vest in His Majesty for the purposes of the government of that Province, and shall in any other case vest in His Majesty, for the purposes of the government of the Federation :
>
> Provided that any property which at the date when it accrued to His Majesty was in the possession or under the control of the Federal Government or the Government of a Province shall, according as the purposes for which it was then used or held were purposes of the Federation or of a Province, vest in His Majesty for the purposes of the government of the Federation or for the purposes of the government of that Province."

(b) Canada.

(b) Canada

There is no corresponding express provision in the British North America Act, 1867. But it has been held by the Privy Council in *Attorney-General of Ontario* v. *Mercer*[1] that lands in Canada escheated to the Crown for defect of heirs belong to the Province in which they are situated and not to the Dominion. It will be seen that the present article and S. 174 of the Government of India Act, 1935, contain the same principle.

Article 296 — Note 1

[1] (1883) 8 App Cas 767 (779) : 52 L J P C 84.

2. Scope of the article. — This article makes an express constitutional provision as regards the vesting of property in the Government by way of escheat or lapse or as *bona vacantia*. The general principle enacted is that if the property is situated in a State, it will vest in the State. But otherwise it will vest in the Union. There is an exception to this rule created by the Proviso, namely, that if at the time that the property accrues to the sovereign power, it is actually in the possession and control of the Government of India or the Government of a State, it will vest in the Government of India or in the Government of a State, as the case may be, irrespective of the situation of the property, according as the purposes for which the property was then used or held were purposes of the Union or the State. In other words, although, as a general rule, the situation is the primary criterion for determining whether the property vests in the Union or a State, the actual user of the property at the time when it accrues to the sovereign authority will determine the question whether the vesting will be in the Union or in the State.

As seen in NOTE 1, the principle that the primary criterion to determine whether the property should be vested in the Union or the State is the situation of the property was first laid down by the Privy Council in *Attorney-General of Ontario* v. *Mercer*,[1] which was a case from Canada. This article embodies this principle though it is modified by its Proviso.

The article does not directly provide as to in what cases or in what circumstances property will accrue to the State by way of escheat, lapse or *bona vacantia*. The article merely provides whether the property should pass to the Union or the State in those cases in which it would have accrued to the Crown or the Ruler of an Indian State if the Constitution had not come into force. So in order to determine whether any property will vest in the Union or the State under this article by escheat or otherwise, it will have to be seen whether under the same circumstances the property would have passed to the Crown or an Indian Ruler in the regime prior to the Constitution. Thus, if the property is situated in an erstwhile Indian State it must be seen whether under the pre-Constitution regime it would have passed to the Ruler of the State by escheat, etc., according to the law of that State.[2]

Article 296 — Note 2

[1] (1883) 8 App Cas 767 (779) : 52 L J P C 84.

[2] *See* 1954 Pepsu 34 (35) [AIR V 41 C 18] : I L R (1953) Patiala 557 (DB), *Net Ram* v. *State*. (This case illustrates the above principle.)

3. Escheat. — The term "escheat" signifies a falling of a deceased person's estate into the general property of the State upon his death intestate and without lawful heirs.[1]

Property can escheat to the State only if the owner of it has died without leaving any heir or reversioner within the degree recognized by law and not otherwise. If the owner leaves the village and goes away and his property is taken possession of by some other person or by the State, he may lose his title because of the adverse possession; but there will be no question of escheat in such a case.[2]

The principle of escheat is based upon the general or universal law and not on personal law. In the case of Hindus and Muhammadans, the personal law of the parties is applicable for determining the question whether the deceased has left any heirs. Where it is found that a deceased Hindu or Muhammadan has not left any heirs according to the personal law, and the deceased has died intestate, his estate will escheat to the State.[3] In the *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*[4], their Lordships of the Privy Council observed as follows :

> "According to the law administered by the Provincial Courts of British India, on the death of any owner, being absolute owner, any question touching the inheritance from him of his property is determinable in a manner personal to the last owner. This system is made the rule for Hindus and Mahommadans by positive regulation; in other cases, it rests upon the course of judicial decisions. But when it is made out clearly that, by the law applicable to the last owner, *there is a total failure of heirs*, then the claim to the land ceases (we apprehend) to be subject to any such personal law; and as all property, not dedicated to certain religious trusts, must have some legal owner, and there can be, legally speaking, no unowned property, the law of escheat intervenes and prevails, and is adopted generally in all the Courts of the country alike. Private ownership not existing, the State must be owner as ultimate lord."

Article 296 — Note 3

1. Law Lexicon of British India by P. Ramanatha Iyer, 1940 Ed., page 400.
2. 1954 Pepsu 34 (35) (Pr 4) [AIR V 41 C 18] : I L R (1953) Patiala 557 (D B), *Net Ram* v. *State*. (Jurisdiction of Civil Court—Law of Indian State providing that the decision of Revenue authorities declaring certain property as escheated to the State is final and cannot be questioned by a civil Court—That law will only apply where the owner had *died*; otherwise, the order of the Revenue authorities would be *void* and without jurisdiction and the civil suit will not *be barred*.)
3. (1860) 8 Moo Ind App 500 (526, 527) (PC), *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah.*
4. (1860) 8 Moo Ind App 500 (526, 527) (P C).

4. Bona vacantia. — Wharton in his Law Lexicon has the following:

> "*Bona vacantia*, things found without any apparent owner which belong to the first occupant or finder, unless they be whale or sturgeon, wreck, treasure-trove, waifs or estrays which belong to the Crown by virtue of its prerogative. So personal property held on trusts which have failed, or held in trust for a corporation which has been dissolved, belongs to the Crown as *bona vacantia*: see *Re Higginson*[1] and cases there cited. By the Companies Act, 1929, S. 296, the property of a dissolved company including property held on trust for it shall, subject to the provisions of the Act, become *bona vacantia*."

On the above principles, funds, vested in certain persons as trustees for a certain society, will, on the society ceasing to exist, devolve on the Crown as *bona vacantia*.[2]

The right of the Crown arises because the property has no other owners; such property must not be confused with property, the owner of which is unknown.[3] As observed by the Privy Council in *Collector of Masulipatam* v. *Cavaly Vencata Narrianapah*[4], "private ownership not existing, the State must be owner as ultimate lord."

5. Situs of property. — It has been seen in NOTE 2 that the primary criterion for determining whether a property vests in the Union or a State is the situation of the property. As regards this point, the following passage from Dicey's CONFLICT OF LAWS, Second Edition (1908), Page 310, may be quoted:

> "Whilst lands, and generally, though not invariably, goods, must be held situate at the place where they at a given moment actually lie, debts, choses in action and claims of any kind must be held situate where the debtor or other person against whom a claim exists resides; or in other words, debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced."

Article 296 — Note 4

[1] (1898) 1 Q B 325.
[*See also* (1932) 101 L J Ch 346 (350, 351, 352) : 48 T L R 617, *In re Wells*. (Equity of redemption in leaseholds mortgaged by assignment by a limited liability company subsequently dissolved, where the equity has not been disposed of before the dissolution, is vested in the Crown as *bona vacantia* even before the coming into force of S. 71, Companies Act, 1928, the provisions of which were not retrospective.)]

[2] (1909) L R 1 Ch 510 (519, 520) : 25 T L R 333, *Braith Waite* v. *Attorney General*.

[3] (1932) 101 L J Ch 346 (352) : 48 T L R 617, *In re Wells*.

[4] (1860) 8 Moo Ind App 500 (525) (PC).

THINGS OF VALUE VEST IN THE UNION

Article 297
Note 1
Pt. 1

Things of value lying within territorial waters to vest in the Union.

297. All lands, minerals and other things of value underlying the ocean within the territorial waters of India shall vest in the Union and be held for the purposes of the Union.

JAMMU AND KASHMIR

Article 297 applies to the State of Jammu and Kashmir.— The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

Synopsis

1. Scope of the article.
2. "Territorial waters". See ART. 245, NOTE 15 (d).
3. Fisheries, legislative power as to.

1. Scope of the article.— There was no provision in the Government of India Act, 1935, corresponding to this article.

What vests in the Union under this article is the bed of the sea beneath the territorial waters and not the waters themselves, and in law the two do not stand in the same position. Therefore, it cannot be said that the article which vests sea beds in the Union Government has also the effect of vesting territorial waters in the Union Government.[1]

2. "Territorial waters".—See ART. 245, NOTE 15 (d).

3. Fisheries, legislative power as to. — Under LIST 2, Entry 21, the State Legislature has power to make laws with respect to 'fisheries'. LIST 1, Entry 57 is "Fishing and fisheries beyond territorial waters". Reading the two entries together it is clear that the State Legislature has power to legislate as regards fisheries *within* territorial waters.

Under LIST 1, Entry 32, the exclusive legislative power as regards property of the Union is vested in the Union. As seen in NOTE 1, territorial waters do not vest in the Union under this article. Hence, the power of the State Legislature to legislate about fisheries in territorial waters is not affected by this article read with LIST 1, Entry 32.[1]

Article 297 — Note 1

1. 1954 Mad 291 (301) (Pr 18) [AIR V 41 C 125] : I L R (1953) Mad 1175 (D B), *A. M. S. S. V. M. & Co.* v. *State of Madras.*

Article 297 — Note 3

1. 1954 Mad 291 (301) [AIR V 41 C 125] : I L R (1953) Mad 1175 (DB), *A. M. S. S. V. M. & Co.* v. *State of Madras.* (*Held* even assuming that territorial waters are vested in the Union, the power of the State Legislature to legislate about *fisheries* in territorial waters, under List 2, Entry 21, will not be affected, on the principle laid down in *Attorney-General for the Dominion of Canada* v. *Attorney-General for the Provinces of Ontario and Nova Scotia*, (1898) 1898 App Cas 700 at p. 709, making a distinction between proprietary rights and legislative

1.Ind. Con. S.F. 69.

Power to acquire property.

298. (1) The executive power of the Union and of each State shall extend, subject to any law made by the appropriate Legislature, to the grant, sale, disposition or mortgage of any property held for the purposes of the Union or of such State, as the case may be, and to the purchase or acquisition of property for those purposes respectively, and to the making of contracts.

(2) All property acquired for the purposes of the Union or of a State shall vest in the Union or in such State, as the case may be.

GOVERNMENT OF INDIA ACT, 1935

For text of S. 175, which corresponded to ART. 298, see NOTE 1.

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in ART. 298 reference to the State shall be construed as not including reference to the State of Jammu and Kashmir.—The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISION

State—Meaning of, see ART. 264 (b).

Synopsis

1. Analogous law.
    - (a) United States of America.
    - (b) Australia.
    - (c) Government of India Act, 1935.
2. Scope.
3. "Subject to any law made by the appropriate Legislature".
4. Contract.
5. Vesting of the property.

1. Analogous law.

(a) United States of America.

(a) United States of America.

Article IV, S. 3 (2) of the Constitution of the United States of America reads as follows:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States . . . . ."

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jurisdiction — *Note* : — It is questionable whether this view would be right under this Constitution in the face of the express provisions in List I, Entry 32 and List II, Entry 35 of Sch. VII—These legislative entries have not been referred to in the judgment — But the legislation in question was a pre-Constitution Provincial Act passed at a time when there was no provision corresponding to Art. 297.)

(b) Australia.

(b) Australia.

The Commonwealth of Australia Act (1900), S. 51, which enumerates the matters on which the Parliament has power to make laws, contains the following item :

> "(xxxi) the acquisition of property on just terms from any state or person for any purpose in respect of which the Parliament has power to make laws."

(c) Government of India Act, 1935.

(c) Government of India Act, 1935.

Section 175, cls. (1) and (2), provide as follows :

> "(1) The executive authority of the Federation and of a Province shall extend, subject to any Act of the appropriate Legislature, to the grant, sale, disposition or mortgage of any property vested in His Majesty for the purposes of the Government of the Federation or of the Province, as the case may be, and to the purchase or acquisition of property on behalf of His Majesty for those purposes respectively, and to the making of contracts :
>
> Provided that any land or building used as an official residence of the Governor-General or a Governor shall not be sold, nor any change made in the purposes for which it is being used, except with the concurrence, in his discretion, of the Governor-General or the Governor, as the case may be.
>
> (2) All property acquired for the purposes of the Federation or of a Province or of the exercise of the functions of the Crown in its relations with Indian States, as the case may be, shall vest in His Majesty for those purposes."

It will be seen that the Proviso to cl. (1) of the above section has not been retained in the present article.

2. Scope. — Under ART. 73 the executive power of the Union extends to all matters with respect to which Parliament has power to make laws : and under ART. 162 the executive power of a State shall extend to all matters with respect to which the Legislature of the State can make laws.

This article specifies some of the powers which the executive has. As seen in ART. 53, NOTE 6, the scope of executive power under a written Constitution must be spelt out from the Constitution itself, although the executive power is not limited to carrying out of the laws made by the Legislature. This article is one of the provisions in the Constitution which expressly confers certain powers on the executive.

The power conferred is the power of acquiring or disposing of property and that of entering into contracts. The article impliedly confers also the power of doing anything which is incidental to the management of the property held by the Government.[1]

3. **"Subject to any law made by the appropriate Legislature."**—As seen in ART. 53, NOTE 6, although executive power is not confined to merely carrying out the behests of the Legislature, and legislative sanction is not necessary in each and every case of the exercise of the executive power, yet the power must not be exercised so as to encroach on the rights of any person unless there is a valid law of the Legislature to support the action of the executive. Thus, the power of acquisition of property under this article will include the power of compulsory acquisition of property. But this power will have to be exercised subject to the provisions of the Constitution as, for instance, ART. 31. Hence, a valid law of the Legislature is a necessary condition precedent to the compulsory acquisition of any person's property by the State. One of the essential conditions of the validity of such a law will be the competence of the particular Legislature, which has made the law, to legislate on the subject.[1]

See also the undermentioned case.[2]

Article 298 — Note 2

1. 1956 Pepsu 3 (6) (Pr 9) [(S) A I R V 43 C 2], *People's Bus Service* v. *State.* (State can do transport business on commercial basis without legislative sanction—See also Art. 53 N. 6, Art. 266 N. 3 and Art. 289 N. 3.)

[*See* 1951 All 257 (Prs. 44, 48) [A I R V 38 C 51] : I L R (1951) 1 All 269 (FB), *Motilal* v. *Uttar Pradesh Govt.* (Per *Malik C. J.* — In a written constitution the executive power must be such power as is given to the Executive or is implied, ancillary or inherent. It must include all powers that may be needed to carry into effect the aims and objects of the Constitution. It must mean more than merely executing the laws. As incidental to the ordinary functions of Government or merely as a trade or a business venture, the State has a right to hold and manage its own property and carry on such trade or business as a citizen has the right to carry on, so long as such activity does not encroach upon the rights of others or is not contrary to law—*Note* : — The question in this case was whether the State Government could engage in trade or business e. g. running a motor transport service, in the absence of an express legislative provision authorising it to do so—It was *held* by the majority of the Full Bench (Agarwala J. dissenting) that the State had such power—See for fuller discussion Art. 53, Note 6.)]

Article 298 — Note 3

1. 1954 S C 251 (252, 253) (Pr 7) [A I R V 41 C 56] : 1954 S C R 779 (SC), *Rajahmundry Electric Supply Corporation Ltd.* v. *State of Andhra.* (Madras Electricity Supply Undertakings (Acquisition) Act (1949) held to be *ultra vires*—AIR 1951 Mad 979, *Reversed.)*

2. 1956 Assam 23 (30) (Pr 18) [A I R V 43 C 12] (DB), *Barada Kanta* v. *State.* (Under an arrangement between a State Government and a certain firm for the distribution of salt when its supply was controlled, the firm was bound to keep on hand a specified quantity of salt. When salt was decontrolled the firm had about 5000 maunds in stock according to this arrangement and suffered a loss of about Rs. 9,000 due to fall in price on account of decontrol. The firm sued the State Government for recovery of this loss. *Held* that assuming that the

4. Contract. — This article expressly empowers the Executive to enter into contracts. This power must be exercised subject to the provisions of ART. 299.

5. Vesting of the property. — Under cl. (2), the property acquired is to vest in the Union or the State, according as the purposes for which it is acquired are those of the Union or of the State.[1]

Property, which is merely requisitioned, does not vest in requisitioning Government.[2]

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299. (1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor or the Rajpramukh of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor or the Rajpramukh by such persons and in such manner as he may direct or authorise.

Contracts.

(2) Neither the President nor the Governor nor the Rajpramukh shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person

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arrangement was enforceable as a contract, the liability of the Government was only contractual and such an agreement between the parties could not control the statutory powers of the Government relating to removing control over controlled commodities. While decontrolling salt, Government acted under a different capacity and not as a party to the alleged contract. The power to control and decontrol vesting in it by the statute could be exercised at any time untrammelled by the conditions of any arrangement between it and other parties. The plaintiff, therefore, could not claim any damages by reason of the fact that Government had decontrolled the salt.)

Article 298 — Note 5

[1] *See* 1952 Mad 835 (837) (Pr 7) [A I R V 39] : I L R (1953) Mad 543 (DB), *Veerappa* v. *State of Madras*. (Under Government of India Act, 1935, S. 175 (2) the property was to vest in *His Majesty* for the purpose of the Federation or the Province — A provision in an Act that the property shall vest in the Province will not make the whole Act *ultra vires* but the property will vest in His Majesty for the purpose of the Province.)

[2] 1949 Cal 312 (313) (Pr 5) [A I R V 36 C 101] (DB), *Calcutta Corporation* v. *Governors of St. Thomas School.*

making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

GOVERNMENT OF INDIA ACT, 1935

For text of S. 175, cls. (3) and (4), which corresponded to ART. 299, see NOTE 1.

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in ART. 299 reference to the State shall be construed as not including reference to the State of Jammu and Kashmir — The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Rajpramukh—Meaning of, see Art. 366 (21).

State—Meaning of, see Art. 264 (b).

"As he may direct or authorise"—For execution on behalf of the President of certain contracts and assurances of property made in the exercise of the executive powers of the Union, see Ministry of Law Notification No. S. R O. 215 dated 9-2-1952, published in the Gazette of India, 1952, Part II Sec. 3, page 182.

Synopsis

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   - (b) Government of India Act, 1935.
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4. Contract must be executed by proper authority.
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6. Formal document whether necessary.
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8. Non-compliance with article — Effect.
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13. ' All contracts.''
14. Contracts made in the exercise of executive power.
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16. Personal liability of the President, Governor or Rajpramukh.
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1. Analogous law

(a) Government of India Act, 1915 (as amended in 1919)

(a) Government of India Act, 1915 (as amended in 1919).

" 30 (1). — The Governor-General in Council and any Local Government may, on behalf and in the name of the Secretary of State in Council, and subject to such provisions or restrictions as the Secretary of State in Council, with the concurrence of a majority of votes at a meeting of the Council of India, prescribes, sell and dispose of any real or personal estate whatsoever in British India, within the limits of their respective Governments, for the time being vested in His Majesty for the purposes of the Government of India, or raise money on any such real or personal estate by way of mortgage, or otherwise and make propor assurances for any of those purposes, and purchase or acquire any property in British India within the said respective limits, and make any contract for the purposes of this Act.

(1a) * * * *

(2) Every assurance and contract made for the purposes of sub-s. (1) of this section shall be executed by such person and in such manner as the Governor-General in Council by resolution directs or authorises, and if so executed may be enforced by or against the Secretary of State in Council for the time being.

(3) * * * *;"

(b) Government of India Act, 1935.

(b) Government of India Act, 1935

"175 (3). — Subject to the provisions of this Act with respect to the Federal Railway authority, all contracts made in the exercise of the executive authority of the Federation or of a Province shall be expressed to be made by the Governor-General, or by the Governor of the Province, as the case may be, and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the Governor-General or Governor by such persons and in such manner as he may direct or authorise.

(4).—Neither the Governor-General, nor the Governor of a Province, nor the Secretary of State shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Act, or for the purposes of the Government of India Act or of any Act repealed thereby, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof."

2. Scope and applicability of the article. — Article 298 declares that the executive power of the Union and of the States shall extend to the transferring of public property, the acquisition of property for the Government and the making of contracts. This article provides as to the manner in which the assurances of property and contracts may be made on behalf of the Government. An assurance is something which operates as a transfer of property.[1] Thus, this article provides for the manner in which the contracts and the transfers of property, referred to in ART. 298, may be effected on behalf of the Central or the State Government, as the case may be.

Clause (2) of the article provides that the President, Governor or Rajpramukh and the officers actually executing the contract or assurance on behalf of the Government, shall not be personally liable in respect thereof.

Article 299 — Note 2

[1] (1896) 65 L J Ch 316 (320) : (1896) 1 Ch 468, *In re Ray*. (Per Kay L. J.)

As regards the manner in which the contract or assurance of property must be made, the article prescribes the following five conditions:

(i) Contracts must be *expressed* to be made by the President, Governor or Rajpramukh, as the case may be.

(ii) Contracts and assurances must be executed, which necessarily implies that they must be in writing and that oral contracts and oral transfers of property will not be binding.

(iii) The documents must be executed by the proper authorities, that is, by the proper officers who have been authorised by the rules made under the article to execute document on behalf of the Government.

(iv) The document must be executed on behalf of the President, Governor or Rajpramukh, as the case may be.

(v) The documents must be executed in such manner as may be required by the rules under the article.

A distinction must be made between a breach of contract committed by Government and an illegality committed by Government. When the validity of a certain order passed by the Government is attacked as being contrary to law or statutory rules, and no remedy on the basis of breach of contract is sought, this article has no application.[2]

3. Contract must be expressed to be made by the President, etc.—The first essential for the validity of a contract by the Government under this article is that the contract must be expressed to be made by the President, the Governor or the Rajpramukh, as the case may be.[1] Under the corresponding S. 175 (3) of the Government of India Act, 1935, also, it was necessary that the contracts on behalf of the Government must be expressed to be made by the Governor-General or the Governor, as the case may be.[2]

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[2] *See* 1952 Assam 76 (78) (Pr 14) [AIR V 39 C 42], *Keshab Prosad* v. *G. K. C. F. Society Ltd.* (Settlement of fishery in favour of appellant—Cancellation of — Appeal against, under Assam Land Revenue Manual, R. 190 — Appellant not asking for any remedy on basis of breach of contract — Appeal confined to *validity* of order of cancellation of settlement—Art. 299 has no application and is no bar to the appellant's contention.)

Article 299 — Note 3

[1] 1955 Assam 86 (90) [(S) AIR V 42 C 19] (DB), *Dharmeswar Kalita* v. *Union of India.*

195 N U C (Cal) 506 [AIR V 42] (DB), *Union of India* v. *Ramnagina Singh.*

[2] 1954 All 393 (397, 414) (Prs. 16 & 99) [AIR V 41 C 169] : ILR (1954) 1 All 582 (DB), *Brij Lal Suri* v. *State of Uttar Pradesh.*

('47) 51 Cal W N 753 (754), *Province of Bengal* v. *S. L. Puri.* (Contract purporting to be by "Government of Bengal" not valid.)

Under S. 30 of the Government of India Act, 1915-1919, contract by the Government was required to be made on behalf of and in the name of the Secretary of State in Council.[3]

Part C States are under the administrative control of the President (ART. 239). So contracts concerning the affairs of a Part C State will have to be expressed as made by the President and will have to be executed by such persons and in such manner as he may direct or authorise.

4. Contract must be executed by proper authority. — It is necessary for the validity of contracts and assurances made on behalf of the Government that they must be executed by the proper authorities on behalf of the Government.[1] The question as to who is the proper authority to execute a contract or assurance on behalf of the Government must be determined in accordance with the appropriate notification issued by the President, the Governor or the Rajpramukh in this behalf. As to officers of various departments authorised to execute contracts and assurances of property on behalf of the President, see Gazette of India, 1952-Part II, Section 3, S. R. O. 215 pp. 182—215, dated 9-2-1952.

5. Oral contracts. — The article expressly requires that contracts and assurances of property must be *executed* by a proper authority. This necessarily implies that oral contracts and oral conveyances of property will not be binding on the Government.[1] But an oral agreement will not be *void in toto*. It will be capable of *ratification*.[2] (See NOTE 11.)

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[3] 1938 Bom 163 (170, 171) [AIR V 25] (DB), *Secretary of State* v. *Bhagwandas.*
1936 Bom 19 (21) [AIR V 23] (DB), *Secretary of State* v. *Yadavgir.*

Article 299 — Note 4

[1] 1955 S C 468 (476) [(S) AIR V 42 C 78] : (1955) 2 S C R 43 : I L R 34 Pat 359 (S C), *Thawardas* v. *Union of India.* (*Held* that the contract in the case should have been executed by the Additional Chief Engineer and not by the Executive Engineer.)

1955 Assam 33 (41) (Pr 31) [(S) AIR V 42 C 9] (DB), *N. Purkayastha* v. *Union of India.*

1951 Mad 855 (856) (Pr 4) [AIR V 38 C 296] (DB), *Bhashyam Iyengar* v. *Superintendent of Police, Special Branch, C. I. D.* (Superintendent of Police C. I. D. renting house in Madras City for residence of Police Officer—*Held* that the Superintendent of Police had no power to rent house on behalf of Government and Government was not the tenant - House could be rented only by the Inspector-General of Police.)

1950 Mad 194 (195, 196) (Pr 7): [AIR V 37 C 83] (DB), *Perumal Mudaliar* v. *Province of Madras.* (Where the correspondence disclosed that the contract was negotiated between the Superintendent of a Government Soap Institute, who was not authorised by the Government, and the defendant and that the contract was also concluded between the same two parties and this was done with the permission of the Director of Industries who had been authorised by the Government, neither the Government nor the Director of Industries entered into a contract with the defendant, and the contract was therefore invalid, as it did not comply with S. 175, Government of India Act, 1935.)

1930 Lah 364 (368) [AIR V 17] (DB), *Secretary of State* v. *Sarin & Co.* (Contract for supply of grain entered into between plaintiff and commanding officer of a depot—Latter held not authorised to enter into a contract.)

6. **Formal document whether necessary.** — The question has arisen whether a formal document is necessary to create a contract by the Government or whether such contract can be spelt out from the correspondence between the parties.[1] Under the Government of India Act, 1915, S. 30, there was no provision that the contract must be expresed to be by the Secretary of State in Council. But in the Government of India Act, 1935, S. 175 (3), it is specifically provided that the contract must be expressed to be by the Governor-General or the Governor, as the case may be. Under cl. (1) of this article also, it is specifically provided that the contract must be expressed to be by the President, the Governor or the Rajpramukh as the case may be.

Under the Government of India Act, 1915, there was a conflict of decisions as to whether a formal document was necessary. In

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Article 299 — Note 5

[1] 1955 Assam 86 (90) (Pr 14) [(S) AIR V 42 C 19] (D B), *Dharmeswar Kalita* v. *Union of India.*
1953 Trav-Co 146 (154) (Pr 18) [AIR V 40 C 50] : I L R (1952) Trav-Co 960 (DB), *Joseph P. J.* v. *Assistant Excise Commissioners, Ernakulam.*
1952 Pat 393 (401) (Prs. 54, 55) [AIR V 39] (DB), *Dalmia Jain and Co. Ltd.* v. *Kalyanpore Lime Works Ltd.*
1941 All 377 (383, 384) [AIR V 28] (D B), *Devi Prasad Shri Krishna Prasad Ltd.* v. *Secretary of State.*
1928 Cal 74 (82) [AIR V 15], *Kessoram Poddar & Co.* v. *Secy. of State.*
[*See* 1927 Rang 14 (18) [AIR V 14] (DB), *Secretary of State* v. *Chettyar Firm.* (Section 30, Govt. of India Act, 1915, clearly contemplates that transfers should be made by written instrument. Where there is no execution of a contract by an officer duly authorised by Government it is not binding on or enforceable against Government.)

[2] 1955 N U C (Cal) 4499 [AIR V 42], *Jagu Singh* v. *Shaukat Ali.* (Payment of rent month after month will be ratification of agreement to take on lease.)

Article 299 — Note 6

[1] 1934 Bom 277 (288, 289) [AIR V 21], *Municipal Corporation, Bombay* v. *Secy of State.*
[*See* 1954 S C 165 (168) [AIR V 41 C 33] : 1954 S C R 958 (S C), *Kalyanpur Lime Works* v. *State of Bihar.* (Case under S. 30 of the Government of India Act, 1915—The Supreme Court observed that the first question posed by the section was "whether the contract was to be executed by a formal document or whether it could be spelt out from the correspondence in which the negotiations were carried out by the parties.")]
[*See also* 1937 Bom 449 (451) [AIR V 24] (DB), *Krishnaji Nilkant* v. *Secy. of State.* ("According to the provisions of the law and the rules in force the contract must be *by a deed* executed on behalf of the Secretary of State and in his name by the proper authority. . .")]

Municipal Corporation, Bombay v. *Secretary of State,*[2] it was held that S. 30 of the Government of India Act, 1915, contemplated a formal deed or instrument in which the contract was set out as being on behalf of and in the name of the Secretary of State in Council. Mirza J., observed as follows :

> "Section 30, Government of India Act, does not expressly lay down that the contract is to be by a formal document. But the provision in this section requiring the contract to be not only on behalf but also in the name of the Secretary of State in Council seems to me to make it necessary that the contract should be evidenced by a formal document in the nature of an indenture or deed to which the Secretary of State in Council is made a party and not merely by correspondence."

In *Sankara Mining Syndicate* v. *Secretary of State*[3] the Madras High Court also expressed the view that a formal deed was necessary to create a contract by the Government.

But an opposite view was expressed by the Bombay High Court in *Secretary of State* v. *Bhagwandas.*[4] But at the same time, it was pointed out in that case that the correspondence out of which the contract was sought to be made out must clearly show that the correspondence was carried on behalf of and in the name of the Secretary of State and that the contract as finally concluded by correspondence was executed by a person authorised by a resolution in that behalf. Beaumont, C. J., also pointed out the difficulty that would be generally felt in showing that the contract complied with the provisions of S. 30. He observed as follows :

> "Whether a formal contract is necessary is a more doubtful question. No doubt the direction in sub-section (2) of S. 30 that the contract must be executed by the proper officer rather suggests a formal contract. The expression "executed" is not a very appropriate term to apply to the process of signing letters. In any case I apprehend that if parties rely on a contract to be spelt out of a series of letters, it would generally be very difficult to show that the contract complied with S. 30, Government of India Act, and obviously in a case to which that section applies the parties would be wise in having a formal document *inter partes.* I do not

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[2] *See also* 1936 Bom 19 (21) [AIR V 23] (DB). (Per *Broomfield J.* – "It is clear that in order to bind the Secretary of State by a contract there must be a deed executed on his behalf and in his name by the proper authority".)

[3] 1938 Mad 749 (752) [AIR V 25] (DB). (Mining lease by Government — No formal lease executed and signed on behalf of Government as prescribed under rules framed under S. 30 (2), Govt. of India Act, 1915 — *Held*, that there was no enforceable contract against Government.)

[4] 1938 Bom 168 (170, 171) [AIR V 25] (DB).

wish, however, to bind myself to the proposition that in no case can a contract comply with S. 30 unless it takes the form of a contract *inter partes*. It is possible that a contract in the form of letters, complying with the provisions of S. 30 and signed by the proper officer would be a contract complying with the terms of the Act."

A similar view, namely, that a contract on behalf of the Government need not be incorporated in a formal deed or under seal and that it may be gathered from correspondence, was also expressed by the Allahabad High Court in *Devi Prasad* v. *Secretary of State.*[5] The Allahabad High Court observed as follows :

> "A good deal of Government business is being done in the form of tenders and acceptance of tenders in which, till a very late stage, formal deeds are not drawn up. However much desirable it may be to have a formal deed with regard to all the agreements made by the Government, we are not prepared to hold, as a matter of law, that an agreement evidenced by tenders and acceptance of tenders or an agreement evidenced by correspondence or other documents of informal nature, though fully established by evidence, must fail and be said to offend the terms of S. 30, Government of India Act. In our opinion, it is a sufficient compliance with the terms S. 30 if the agreement is expressed in writing, and this writing may comprise of a series of letters or a series of informal documents."

At the same time, the Allahabad High Court pointed out the desirability of having a formal document and in this connection observed as follows :

> "It will be in the public interest and desirable from every point of view if the Government Officers, after an agreement is reached, take the precaution of preparing a memorandum signed by both parties, setting out the terms which are reached. The practice of leaving the agreement in the form of correspondence and tenders in anticipation of a formal deed to be executed later on is irregular and has nothing to recommend. The proper procedure should be that, after an agreement is reached a memorandum of the agreement should be contemporaneously prepared and signed by the parties as evidence of the agreement to be followed later on by a formal document drawn up by a Government conveyancer, but we do not think whatever may be said from the point of view of expediency and public interest— that the law requires that contemporaneously with an oral agreement a document should also be prepared or signed, and it

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[5] **1941 All 377 (383, 384, 385) [AIR V 28] (DB).**

is permissible to record the agreement, arrived at orally, later on by correspondence."

It has been seen above that there is a difference in the language between S. 30 (2) of the Government of India Act, 1915 and S. 175 (3) of the Government of India Act, 1935. The provisions of this article are similar to those of the Government of India Act of 1935 in this respect.

But the conflict of views as to whether a formal deed is necessary to create a contract by Government or whether such a contract can be contained in the correspondence exchanged between the parties still continues. The Assam High Court seems inclined to the view that a formal deed is necessary.[6] That High Court has pointed out that the language of S. 30 (2) of the Government of India Act, 1915 left room for the view that a formal deed was not necessary for a contract by the Government, but that the change in the language of S. 175 (3) of the Government of India Act, 1935, pointed to the need of a formal deed. But the Madras High Court has held that where the Government takes up the lease of building of a private person, a formal document of lease is not necessary as evidence of tenancy of the Government and that the lease can be inferred from correspondence, in which case, however, there should be a communication signed by an officer with due authority.[7]

In the undermentioned case,[8] the Calcutta High Court held that a lease of Government property was neither a contract nor an assurance and was thus outside S. 175 (3) of the Government of India Act, 1935, and the rules made thereunder.

But in spite of the above conflict of views, it is clear that assuming that a formal deed is not necessary and that a contract may be inferred from the correspondence, the contract must show *ex facie* that it has been entered into by or on behalf of the Government and the mere fact that in actual fact it has been authorised by the proper authority is not enough.[9] In this connection the observations of Beaumont C. J. of the Bombay High Court quoted above may be also recalled.

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[6] 1955 Assam 86 (90) (Pr 14) [(S) AIR V 42 C 19] (DB), *Dharmeswar Kalita* v. *Union of India.*

[7] 1951 Mad 855 (856) (Pr 4) [AIR V 38 C 296] (DB), *Bhashyam* v. *Superintendent of Police, Madras.*

[8] 1951 Cal 361 (366) (Pr 65) [AIR V 38 C 86] : I L R (1951) 2 Cal 444 (D B), *Manindranath* v. *Amiya Pal.*

[*See also* 1955 N U C (Cal) 4499 [AIR V 42], *Jagu Singh* v. *M. Shaukat Ali.* (Oral agreement by or on behalf of Government is not *void* and can be ratified —Payment of rent month after month is sufficient ratification.)]

[9] 1955 Assam 86 (90) [(S) AIR V 42 C 19] (DB), *Dharmeswar Kalita* v. *Union of India.*

1951 Mad 855 (856) [AIR V 38 C 296] (D B), *Bhashyam* v. *Superintendent of Police, Madras.*

Further, it is to be noted that the contract is required under cl. (1) to be executed by such persons and in such manner as the President, Governor or Rajpramukh may direct or authorise. Hence, where the rules under the clause require a formal deed of contract, such formal deed will be essential for the validity of the contract.[10]

7. Contract by correspondence—Validity.—See Note 6.

8. Non-compliance with article — Effect. — Under the Evidence Act, S. 91, where a contract is required by law to be reduced to the form of a document, the contract can only be proved by producing the document and not otherwise. This rule applies also to Government contracts. Hence, as such contracts are required to be in the form of a document drawn up in accordance with the provisions of this article, a contract with the Government can only be proved by producing the document.[1]

The provisions of this article are mandatory and not merely directory. Hence, if the contract with the Government is not in the form required under this article, it will not be binding on either party, so that the contract can be enforced neither against the Government[2]

1950 Mad 194 (195) (Pr 7) [AIR V 37 C 83] (DB), *Perumal Mudaliar* v. *Province of Madras.*

[10] 1954 S C 165 (168) [AIR V 41 C 33] : 1954 S C R 958 (S C), *Kalyanpur Lime Works* v. *State of Bihar.* (Case under S. 30, Government of India Act, 1915—See the observations in this case at p. 168 of the A. I. R. There Their Lordships specially draw attention to the fact that there was no particular *manner* prescribed by the Governor-General as to how the contract was to be executed. Their Lordships then proceed to state that the first question that arises "in this connection' is whether a formal document was necessary or whether the contract could be spelt out from the correspondence.)]

Article 299 — Note 8

[1] 1952 Pat 393 (403) [AIR V 39] (DB), *Dalmia & Co.* v. *Kalyanpore Lime Works Ltd.*

[2] 1954 S C 236 (243) (Pr 40) [AIR V 41 C 53] : 1954 S C R 817 (S C), *Chatturbhuj Vithaldas* v. *Moreshwar Parashram.*

1955 S C 468 (476) [(S) AIR V 42 C 78] : (1955) 2 S C R 48: ILR 34 Pat 359 (SC), *Thawardas* v. *Union of India.*

1955 Assam 86 (90) [(S) AIR V 42 C 19] (DB), *Dharmeswar Kalita* v. *Union of India.*

1955 Assam 33 (41) (Pr 31) [(S) AIR V 42 C 9] (DB), *N. Purkayastha* v. *Union of India.*

1955 Madh B 188 (Pr 9) [(S) AIR V 42 C 59] (DB), *Satya Prakash* v. *Commissioner, Land Reforms and Jagirs.* (The existence of a legal right is the foundation of the exercise of the jurisdiction under Art. 226. AIR 1952 S C 12 (SC) ; AIR 1953 S C 210 (SC and AIR 1950 Madh B 46, *Rel. on*—Where the petitioners claim to enforce a right to certain forest areas and to the manufactured material (charcoal and kattha) under contracts between them and the nor by the Government.[3]

There is no difference in the legal position on this question between the effect of this article and the corresponding provisions of the Government of India Acts of 1915 and 1935. Thus, in *Kessoram Poddar and Co.* v. *Secretary of State*[4] which was a case relating to S. 30 of the Government of India Act, 1915, the Calcutta High Court observed as follows :

> ". . . . While there is no magic in a written contract, it is a safeguard which has been laid down by the statute for the protection of the public revenues. When, therefore, a statute lays down certain mandatory provisions in regard to the framing of contracts between the Secretary of State and a private individual, it is no answer to say that because the provisions were ignored on particular occasions and payments were made on contracts which were not in conformity with the statute, that should be taken as a precedent which will be binding upon the Secretary of State in every case. In my judgment, contracts to be binding upon the

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State authority (the D. F. O.) and the contracts admittedly do not comply with the requirements of Art. 299 (1), the contracts being unenforceable, the petitioners have no legal right to work the forest areas and to the manufactured material, which can be enforced by any direction or writ under Art. 226.

The provisions of Art. 299 (1) are mandatory and if a contract on behalf of the Government does not satisfy the requirements of that article, the contract is not binding on the Government and is unenforceable against it : AIR 1954 SC 236 (SC) ; AIR 1952 Cal 306 and (S) AIR 1955 Assam 86, Rel. on; *Attorney General for Prince of Wales* v. *Cullom*, (1916) 2 K B 193 and *Robertson* v. *Minister of Pensions*, (1949) 1 K B 227, *Disting.*)

1955 N U C (Cal) 506 [A I R V 42] (DB) *Union of India* v. *Ram Nagina Singh.*

1954 All 393 (397) (Pr 16) [AIR V 41 C 169] : ILR (1954) 1 All 582 (DB), *Brijlal* v. *State of Uttar Pradesh.*

1953 Cal 319 (320) (Pr 6) [AIR V 40 C 111], *Subodh Ranjan* v. *N. A. O'Callaghan.*

1952 Cal 306 (309) (Pr 19) [AIR V 39 C 80], *Ram Nagina Singh* v. *Governor-Genaral in Council.*

('47) 51 Cal W N 753 (754) (DB), *Renubala Dutta* v. *Corporation of Calcutta.*

1941 All 377 (383) [AIR V 28] (DB), *Devi Prasad Sri Krishna Prasad Ltd.* v. *Secretary of State.*

1937 Bom 449 (451) [AIR V 24] (DB), *Krishnaji Nilkant* v. *Secretary of State.*

1930 Lah 364 (368) [AIR V 17] (DB), *Secretary of State* v. *Sarin & Co.*

1928 Cal 74 (82) [AIR V 15], *Kessoram Poddar & Co.* v. *Secretary of State.*

[3] 1955 Assam 33 (45) [(S) AIR V 42 C 9] (DB), *N. Purkayastha* v. *Union of India*

1954 All 393 (397, 414) (Prs 16, 99) [AIR V 41 C 169]: ILR (1954) 1 All 582 (DB), *Brijlal* v. *State of Uttar Pradesh.*

1951 Mad 853 (856) [A I R V 38 C 296] (DB), *Bhashyam Iyengar* v. *Superintendent of Police, Special Branch, C. I. D.*

1950 Mad 194 (Pr 7) [AIR V 37 C 83] (DB), *Perumal* v. *Madras Province.*

[4] 1928 Cal 74 (82) [AIR V 15]. (Case under S. 29 (5) of the Government of India Act, 1915.)

Secretary of State, must be made in strict conformity with the provisions laid down in the statute. If they are not so made, they are not valid as against him."

The principle applicable in such cases was laid down in *Young* v. *Mayor of Royal Leamington Spa.*[5] In that case the statute provided that every contract made by an urban authority and exceeding in value or amount £ 50 must be in writing and under seal. It was held that the provision was obligatory and not merely directory and a contract not under seal as required by a statute was held to be bad and unenforceable. Lord Bramwell observed as follows in course of his judgment in the case :

> " The Legislature has made provisions for the protection of rate payers, share-holders, and others, who must act through the agency of a representative body, by requiring the observance of certain solemnities and formalities which involve deliberation and reflection. That is the importance of the seal. It is idle to say there is no magic in a wafer. It continually happens that carelessness and indifference on the one side, and the greed of gain on the other, cause a disregard of these safeguards, and improvident engagements are entered into."

The view set forth above has received the endorsement of the Supreme Court which has also recognised the principle that a contract which is not in conformity with the requirements of this article is not enforceable against the Government.[6] Thus, in *Thawardas* v. *Union of India,*[7] the Supreme Court observed as follows :

> " It is well settled that Governments can only be bound by contracts that are entered into in a particular way and which are signed by the proper authorities."

So also in *Chatturbhuj Vithaldas Jasani* v. *Moreswar Parashram,*[8] the Supreme Court observed as follows :

> "We feel that some reasonable meaning must be attached to ART. 299 (1). We do not think the provisions were inserted for the sake of mere form. We feel they are there to safeguard Government against unauthorised contracts."

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[5] (1883) 8 App Cas 517 (527, 528) : 52 L J Q B 713.

[6] 1955 S C 468 (476) [(S) AIR V 42 C 78] : (1955) 2 S C R 48 : ILR 34 Pat 359 (S C), *Thawardas* v. *Union of India.*

1954 S C 236 (243) [AIR V 41 C 53]: 1954 S C R 817 (SC), *Chatturbhuj Vithaldas* v. *Moreshwar Parashram.*

[7] 1955 S C 468 (476) (Pr 25) [(S) A I R V 42 C 78] : (1955) 2 S C R 48 : ILR 34 Pat 359 (SC). (Contract for supply of bricks — Signature by Executive Engineer instead of by Additional Chief Engineer — Contract held not binding on Government.)

[8] 1954 S C 236 (243) [AIR V 41 C 53] : 1954 S C R 817 (SC).

The Supreme Court held in the case that a contract which did not conform to the provisions of this article could not be enforced against Government.

In this connection, reference may be made to the provisions of ARTS. 77 and 166. Under ART. 77 all executive action of the Government of India shall be expressed to be taken in the name of the President. It is also provided in the article that orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President and that the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President. A similar provision is contained in ART. 166 as regards the executive action of the Government of a State.

There were similar provisions in the Government of India Act, 1935, also, concerning the form of Government orders. In *J. K. Gas Plant Manufacturing Co.* v. *Emperor*[9] it was held by the Federal Court that the provisions of SCH. IX, S. 40 (1), Government of India Act, 1935, corresponding to ART. 77, were only directory and not mandatory and that merely because an order by the Governor-General was not expressed to be made by the Governor-General, it would not be invalid. A similar view as to the effect of ART. 166 was taken by the Supreme Court in *Dattatraya Moreshwar* v. *State of Bombay*.[10]

In *Chatturbhuj Vithaldas Jasani* v. *Moreshwar*[11] the Supreme Court considered the applicability of the above rulings to the interpretation of this article and held that there was a vital distinction in the provisions which were in question therein and the provisions of this article and that the above rulings are, therefore, not applicable to the interpretation of this article. In this connection the Supreme Court observed as follows :

> "None of these provisions is quite the same as ART. 299. For example, in ART. 166, as also in S. 40(1), Government of India Act, 1935, there is a clause which says that 'orders' and 'instruments' and 'other proceedings' 'made' and 'expressed' in the name of the Governor or Governor-General in Council and authenticated in the manner prescribed shall not be called in question on the ground that it is not an 'order' or 'instrument', etc., 'made' or 'executed' by the Governor or Governor-General in Council.

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[9] 1947 F C 38 (Pr 13) [AIR V 34 C 10] : 1947 F C R 141 : ILR (1947) Bom 713: 48 Cri L Jour 886 (FC). (Order though purporting to be made by "Central Government" must be held to be made by the Governor-General in Council.)

[10] 1952 S C 181 (183) (Pr 18) [A I R V 39] : 1952 S C R 612 : 1952 Cri L Jour 955 (SC).

[11] 1954 S C 236 (243) [AIR V 41 C 53] : 1954 S C R 817 (S C).

> "It was held that the provisions had to be read as a whole and when that was done it became evident that the intention of the Legislature and the Constitution was to dispense with proof of the due 'making' and 'execution' when the form prescribed was followed but not to invalidate orders and instruments otherwise valid. Article 299 (1) does not contain a similar clause, so we are unable to apply the same reasoning here."

(See also ART. 166, NOTE 4 for a consideration of the question whether the provisions of that article are directory or mandatory.)

Although the Supreme Court has held the provisions of this article to be mandatory and not directory, the effect of the article, according to the Supreme Court, is only to make a contract, which is not in conformity therewith, *unenforceable against the Government* but not to make the contract *void.*

The view of the Supreme Court, as expressed in *Chatturbhuj Vithaldas Jasani's case,*[12] is that in such cases S. 230 (3) of the Contract Act would apply and the contract, although not in the proper form as required by this article, may be enforced against the particular officer who has actually entered into the contract on behalf of the Government. On this reasoning, the Supreme Court held in the above case that such a contract is not void in the sense of its being a mere nullity. Hence, it was held by the Supreme Court that a person who had such a contract with the Government would come under the disqualification mentioned in S. 7, cl. (d) of the Representation of the People Act and would, therefore, be incompetent to stand as a candidate for election to the State Legislature. The Supreme Court observed as follows in this connection :

> "In our opinion, this is a type of contract to which S. 230 (3), Contract Act, would apply. This view obviates the inconvenience and injustice to innocent persons which the Federal Court felt in *J. K. Gas Plant Manufacturing Co. Ltd.* v. *Emperor,*[13] and at the same time protects Government. We feel that some reasonable meaning must be attached to ART. 299 (1). We do not think the provisions were inserted for the sake of mere form. We feel they are there to safeguard Government against unauthorised contracts. If in fact a contract is unauthorised or in excess of authority it is right that Government should be safeguarded.
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> "On the other hand, an officer entering into a contract on behalf of Government can always safeguard himself by having recourse to the proper form. In between is a large class of contracts,

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[12] 1954 S C 236 (243) (Prs 40, 41) [AIR V 41 C 53] : 1954 S C R 817 (SC), *Chatturbhaj Vithaldas* v. *Moreshwar Parashram.*

[13] 1947 F C 38 (41, 42) [A I R V 34 C 10] : 1947 F C R 141 : I L R (1947) Bom 713 : 48 Cri L Jour 886 (FC).

probably by far the greatest in numbers, which, though authorised, are for one reason or other not in proper form. It is only right that an innocent contracting party should not suffer because of this and if there is no other defect or objection, we have no doubt Government will always accept the responsibility. If not, its interests are safeguarded as we think the Constitution intended that they should be.

"In the present case, there can be no doubt that the Chairman of the Board Administration acted on behalf of the Union Government and his authority to contract in that capacity was not questioned. There can equally be no doubt that both sides acted in the belief and on the assumption, which was also the fact, that the goods were intended for Government purposes, namely, amenities for the troops. The only flaw is that the contracts were not in proper form and so, because of this purely technical defect, the principal could not have been sued. But that is just the kind of case that S. 230 (3), Contract Act, is designed to meet.

"It would, in our opinion, be disastrous to hold that the hundreds of Government officers who have daily to enter into a variety of contracts, often of a petty nature, and sometimes in an emergency, cannot contract orally or through correspondence and that every petty contract must be effected by a ponderous legal document couched in a particular form. It may be that Government will not be bound by the contract in that case, but that is a very different thing from saying that the contracts as such are void and of no effect. It only means that the principal cannot be sued; but we take it there would be nothing to prevent ratification, especially if that was for the benefit of Government.

"There is authority for the view that when a Government officer acts in excess of authority Government is bound if it ratifies the excess: See *Collector of Masulipatam* v. *Cavaly Venkata Narrainappah.*[14] We accordingly hold that the contracts in question here are not void simply because the Union Government could not have been sued on them by reason of ART. 299 (1).

"Now S. 7 (d), Representation of the People Act, does not require that the contracts at which it strikes should be enforceable against the Government; all it requires is that the contracts should be for the supply of goods to the Government. The contracts in question are just that and so are hit by the section.

"The purpose of the Act is to maintain the purity of the Legislatures and to avoid a conflict between duty and interest. It is obvious that the temptation to place interest before duty is just as great when there is likely to be some difficulty in recovering the money from Government (for example, if Government were to choose not to ratify the contracts) as when there is none."

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[14] (1861) 8 Moo Ind App 529 (554) (PC).

In the above case, the Supreme Court did not refer to cl. (2) of this article under which the officer making the contract on behalf of the Government is not personally liable on the contract. This provision must be taken to refer to cases in which the contract is in conformity with the requirements of this article and hence enforceable against the Government. Taken in that sense, the provision will only be an enactment of the principle contained in S. 230 of the Contract Act.

The Supreme Court, as stated already, has held that where a contract on behalf of the Government is not in the required form under this article, the officer who has entered into the contract on behalf of the Government would be personally liable on the contract under S. 230 (3) of the Contract Act. This also means that such officer would be entitled to enforce the contract personally under S. 230 of the Contract Act, although the *Government* would not be entitled to enforce it, as seen already. The decision of the Supreme Court in *Chatturbhuj Vithaldas's case*[15] cannot be regarded as implying that a contract which does not conform to the prescribed requirements is enforceable *by* the Government, although it is not enforceable *against* the Government.

It must be noted that in *Chatturbhuj Vithaldas's case*,[16] the authority of the officer contracting on behalf of the Government was not questioned, and the only flaw in the contract was as to its *form.* It is conceived that where the officer is not authorised to contract on behalf of the Government, the ruling of the Supreme Court would not apply and that the contract must be held to be *void* so far as the Government is concerned.[17] (See also NOTE 9.)

Moreover, it would seem that the observations of the Supreme Court in *Chatturbhuj Vithaldas's case*[18] should be taken to mean only that a contract which is not in accordance with the prescribed form is not an *absolute nullity for all purposes.*[19] As to whether such a contract is 'void' within the meaning of S. 65 of the Contract Act, see NOTE 9.

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[15] 1954 S C 236 (243) [AIR V 41 C 53] : 1954 S C R 817 (SC), *Chatturbhuj Vithaldas* v. *Moreshwar Parashram.*

[16] 1954 S C 236 (243) [AIR V 41 C 53] : 1954 S C R 817 (SC), *Chatturbhuj Vithaldas* v. *Moreshwar Parashram.*

[17] 1955 Assam 33 (42) (Pr 34) [(S) AIR V 42 C 9] (DB), *N. Purkayastha* v. *Union of India.* (In such a case the contract would be 'void' within the meaning of S. 65 of the Contract Act and relief under that section may be given in proper cases.)

[18] 1954 S C 236 (243) [AIR V 41 C 53] : 1954 S C R 817 (SC), *Chatturbhuj Vithaldas* v. *Moreshwar Parashram.*

[19] 1955 Assam 86 (95) (Pr 30) [(S) A I R V 42 C 19] (DB), *Dharmeshwar* v. *Union of India.* (See the observations of Ram Labhaya J., at para 30

In this connection, it may also be pointed out that under Contract Act, S. 2 (g), "an agreement not enforceable by law is said to be void." The Supreme Court's decision that the agreement was not enforceable against the Government, therefore, clearly means that the agreement is "void" within the meaning of the Contract Act. When the Supreme Court said that the Contract was not 'void', it is obvious that the Supreme Court was not using the term 'void' in the sense defined in the Contract Act.

Where a contract on behalf of the Government does not conform to the requirements of this article, it cannot be validated on the ground of its being in accordance with the usual practice in regard to Government contracts with respect to the matter in question.[20]

Where the cause of action against the Government in respect of a certain Government order is based not on breach of contract but on the illegality of the Government order complained against, non-compliance with the requirements of this article in regard to a contract by the Government relating to the same matter, is no answer to the claim against the Government.[21]

Where in a suit based on a contract with the Government the plea that the contract is not in conformity with the requirements of this article is not taken in the trial Court, a party may be precluded from taking the point in appeal where it depends upon evidence.[22]

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explaining the judgment of the Supreme Court in *Chatturbhuj Vithaldas's case*, A I R 1954 S C 236 (SC): "The contracts were not regarded as utter nullities.")

20. 1955 Assam 33 (37) (Pr 14) [(S) A I R V 42 C 9] (D B), *N. Purkayastha* v. *Union of India*. (Occasional departure from Rules *is no answer* to objection as to competency of an officer to make commitment on behalf of the Government —Practice of submitting estimates for sanction after commencement of work cannot validate contracts which for want of competency or power in the officer concerned are void in law.)

1928 Cal 74 (82) [AIR V 15], *Kessoram Poddar & Co.* v. *Secy. of State.* (It is no answer to say that because the provisions were ignored on particular occasions and payments were made on contracts which were not in conformity with the statute, that should be taken as a precedent which will be binding upon the Secretary of State in every case.)

21. 1952 Assam 76 (78) (Pr 14) [AIR V 39 C 42], *Keshab Prosad* v. *G. K. C. F. Society Ltd.* (*Held* where in an appeal under R. 190 of the Assam Land Revenue Manual against an order of cancellation of settlement of fishery in favour of the appellant the appellant has not as a matter of fact asked for any remedy for breach of an 'executive contract' but the appeal is confined only to the validity of the order of cancellation of the settlement of the fishery with the appellant and the settlement thereof with the respondents, Art. 299 has no application.)

22. 1955 Punj 240 (241) (Pr 4) [A I R V 42 C 90], *Prince & Co.* v. *Governor General in Council.* (Appeal against order setting aside award—Objection to

9. Relief under section 65, Contract Act.—Under S. 65 of the Contract Act, when an agreement is discovered to be void, any person, who has received an advantage[1] under such agreement, is bound to restore it or to make compensation for it to the person from whom he received it. The question has been raised in some recent decisions as to whether this section will apply to cases in which a contract entered into on behalf of the Government is found to be unenforceable against the Government on the ground that it does not conform to the requirements of this article. The view expressed in these decisions is that relief under S. 65 of the Contract Act can be granted in such cases if the benefit under the Contract was received prior to the discovery of its invalidity.[2]

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arbitration agreement on the basis that contract containing same did not comply with requirements of S. 175 (3), Government of India Act, cannot be raised in arguments for the first time : AIR 1954 S C 165 (S C), *Rel. on.*)

[*See* 1954 S C 165 (168, 169) [AIR V 41 C 33] : 1954 S C R 958 (SC), *Kalyanpur Lime Works* v. *State of Bihar.* (Civil P. C. (1908), O. 6, R. 8 and O. 8, R. 2 leave no doubt that the party denying merely the factum of the contract and not alleging its unenforceability in law must be held bound by the pleadings and precluded from raising the legality or validity of the contract — *Held*, that on the facts of the case the High Court was not justified in allowing the question to be raised at the time of the arguments when the plaintiff had had no opportunity to adduce evidence upon the question of fact whether the leases were signed on behalf of the Government.)]

Article 299 — Note 9

[1] *See* 1956 Assam 23 (30) (Pr 18) [A I R V 43 C 12] (DB), *Barada Kanta* v. *State.* (Under arrangement between State Government and a firm for distribution of salt when its supply was controlled, the firm was bound to keep on hand a specified quantity of salt. When salt was decontrolled the firm had about 5000 maunds in stock according to this arrangement and suffered a loss of about Rs. 9,000 due to fall in price on account of decontrol. The firm sued the State Government for recovery of the loss—*Held*, (assuming contract to be enforceable) that the power of decontrol which was a statutory power could be exercised at any time untrammelled by the contract, and so there was no breach of contract by State Government—Assuming that the contract was not enforceable, no relief under Contract Act, S. 65 could be claimed as the Government had not received any benefit under the contract.)

[2] 1955 Assam 86 (96) (Pr 32) [(S) AIR V 42 C 19] (DB), *Dharmeshwar* v. *Union of India.*

1955 Assam 33 (42) (Pr 34) [(S) AIR V 42 C 9] (DB), *N. Purkayastha* v. *Union of India.*

1955 N U C (Cal) 506 [A I R V 42] (DB), *Union of India* v. *Ramnagina Singh.* (Confirming on appeal AIR 1952 Cal 306.)

1952 Cal 306 (313) (Prs 58, 59) [AIR V 39 C 80], *Ram Nagina Singh* v. *Governor General in Council.* (Where a contract for the supply of bricks entered into between the plaintiff and a Government Department was discovered to be void by reason of non-compliance with the statutory requirements of S. 175 (3), Government of India Act, 1935 and neither of the parties knew the agreement to be void and both the parties proceeded on the assumption that the agreement was valid and the goods were supplied and received under a misapprehension

The first point to be considered in connection with this question is whether in the face of the decision of the Supreme Court in *Chatturbhuj Vithaldas Jasani* v. *Moreshwar Parashram*[3] it can be maintained that a contract, which is not in conformity with the requirements of this article, is "void" within the meaning of S. 65 of the Contract Act. This decision of the Supreme Court has been discussed in NOTE 8. It has been seen there that the Supreme Court has observed that a contract, which does not conform to the requirements of this article, is not "void"; hence the question arises whether S. 65 of the Contract Act will apply to such cases in the face of the decision of the Supreme Court.

The effect of the observations of the Supreme Court in *Chatturbhuj Vithaldas's case*[4] has been considered in NOTE 8 and it has been submitted that the decision of the Supreme Court must be taken to lay down that a contract which does not conform to the requirements of this article is not an absolute nullity for all purposes but that, in spite of its unenforceability against the Government, its existence can be recognized for certain purposes, as, for instance, for the purpose of deciding whether a candidate for election to a Legislature, who holds such a contract with the Government for the supply of goods to the Government, can be held to be disqualified within the meaning of S. 7 (d) of the Representation of the People Act. It has also been pointed out in NOTE 8 that in view of the definition of void agreement in S. 2 (g) of the Contract Act, the Supreme Court, which held that the contract was not enforceable against the Government, cannot have used the word "void" in the sense of the Contract Act, when it said that the contract was not void. The word "void" in S. 65 of the Contract Act must obviously be understood in the sense defined in S. 2 (g) of the Act. Hence, the admitted unenforceability of the contract would make it void for the purpose of S. 65, and the decision of the Supreme Court in

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as to the rights of the parties under the agreement it was held that S. 65, Contract Act, was applicable to the case and the plaintiff was entitled to receive compensation under that section.)

[*See also* 1955 Manipur 49 (54) (Pr 18) [(S) AIR V 42 C 10], *Rabindra Kumar* v. *Forest Officer*. (It is only right that an innocent contracting party should not suffer because a contract on behalf of the Government is entered into by an Officer of the Government and if there is no other defect or objection Government will always accept the responsibility : A I R 1954 S C 236 (S C), *Foll.*—Contract with forest department to cut trees in forest—Work done accordingly—*Held* plea by Government that there was no formal contract on behalf of Government should not be accepted.)]

[3] 1954 S C 236 (243) [AIR V 41 C 53] : 1954 S C R 817 (S C).

[4] 1954 S C 236 (243) [A I R V 41 C 53] : 1954 S C R 817 (S C), *Chatturbhuj Vithaldas* v. *Moreshwar Parashram*.

Chatturbhuj Vithaldas's case[5] does not seem to preclude such an interpretation of the section.

The meaning and effect of the decision of the Supreme Court and its observations in *Chatturbhuj Vithaldas's case*[6] were explained by the Assam High Court in *Dharmeswar* v. *Union of India.*[7] In that case, Ram Labhaya, J., observed as follows, while explaining the decision of the Supreme Court :

> "When a contract is found to be unenforceable against the Government, it would be void within the meaning of S. 2 (g), Contract Act. An enforceable agreement is void. It therefore will have no effect and would therefore be void in law so far as the Government was concerned. The contracts were, however, not regarded as utter nullities as in their Lordships' view the officers of the Government, who entered into the contract, could be sued under S. 230 (3). Clause (3) of S. 230 applies to cases where the principal, who is a party to the agreement, cannot be sued.
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> "The agent, who may be sued under S. 230 (3), is not sued on the basis of the agreement alone. He is no party to the agreement. But by reason of his failure to enter into a contract in such a way that the disclosed principal would be bound by it, he can be proceeded against as a substitute for the principal on the footing of the agreement. The liability is more statutory than contractual, though the agreement could form a substantial part of the cause of action when an agent is sued under S. 230 (3). It was for this reason that the contracts were not described as utter nullities. But it does not follow from it that the contracts were not void against the Union as being unenforceable.
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> "The conclusion arrived at by their Lordships therefore cannot be utilized for taking away the present case out of the ambit of S. 65, Contract Act. It must be observed that their Lordships were not at all considering the question whether S. 65 is applicable if the agreement is found to be unenforceable against the Union or any State Government. The decision, therefore, is no authority on the question which is now before us."

Another question which has arisen in connection with the applicability of S. 65 of the Contract Act to contracts which are held unenforceable against the Government for non-compliance with the requirement of this article is whether the principle of the decision of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose*[8] will

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5. 1954 S C 236 [AIR V 41 C 53] : 1954 S C R 817 (SC), *Chatturbhuj Vithaldas* v. *Moreshwar Parashram.*

6. 1954 S C 236 [AIR V 41 C 53] : 1954 S C R 817 (SC), *Chatturbhuj Vithaldas* v. *Moreshwar Parashram.*

7. 1955 Assam 86 (94) (Pr 32) [(S) AIR V 42 C 19] (DB).

8. ('03) ILR 30 Cal 539 (548) (PC).

come in the way of the granting of relief under S. 65 of the Contract Act in such cases. In *Mohori Bibee's case*,[9] it was held that a contract by a minor was void. It was argued before their Lordships of the Privy Council that even though a contract by a minor was void, the minor was bound under S. 65 of the Contract Act to restore the advantage received under the void contract. The contention did not prevail with their Lordships, who overruled it and observed that

> "it was sufficient to say that this section, like S. 64, starts from the basis of there being an agreement or contract between competent parties and has no application to the case in which there never was and there could not have been a contract."

On this question also, it has been held that the principle laid down by the Privy Council in *Mohori Bibee's case*[10] is not applicable to contracts with the Government which fail on account of non-compliance with the required formalities, the reason being that in such cases the contract does not fail on account of the fact that the parties are not competent to contract but on account of certain collateral circumstances.[11]

It should also be noted that the granting of relief under S. 65 of the Contract Act does not amount to an indirect contravention of the provisions of this article, inasmuch as relief under S. 65 is specifically granted on the basis that the contract is void and there is no attempt to enforce the contract as such.[12]

The fact that it is open to the plaintiff to proceed personally against the Officer concerned under S. 230 (3) of the Contract Act is no ground for refusing relief under S. 65 of the Contract Act against the Government by way of restoration of the advantage received by it under the invalid contract.[13]

The ordinary presumption is that parties know the law. But the presumption may be rebutted by special circumstances in a case if it is proved as a fact that the parties were under a misapprehension as to their rights and did not know in fact that the agreement which they had entered into was void by reason of a statutory provision of which they had no knowledge or appreciation. In other words, in spite of the presumption of knowledge of law by every one, other facts can be taken into account in considering the question whether in fact the parties, at the time when they entered into the agreement, knew it to be void.[14]

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[9] ('03) ILR 30 Cal 539 (548) (PC), *Mohori Bibee* v. *Dharmodas Ghose.*

[10] ('03) ILR 30 Cal 539 (548) (PC), *Mohori Bibee* v. *Dharmodas Ghose.*

[11] 1955 Assam 86 (96) (Pr 36) [(S) A I R V 42 C 19] (D B), *Dharmeshwar* v. *Union of India.* (See observations of Sarjoo Prosad J.)
1955 N U C (Cal) 506 [A I R V 42] (D B), *Union of India* v. *Ramnagina Singh.* (Confirming on appeal AIR 1952 Cal 306.)

[12] 1955 Assam 86 (94) [(S) A I R V 42 C 19] (D B), *Dharmeshwar* v. *Union of India.* (Restoration of advantage received does not amount to enforcement of the contract.)
1955 Assam 33 (44) (Pr 39) [(S) A I R V 42 C 9] (DB), *N. Purkayastha* v. *Union of India.*

[13] 1955 Assam 86 (95) (Pr 30) [(S) A I R V 42 C 19] (D B), *Dharmeshwar* v. *Union of India.*

Merely because the rates allowed to a party under a Government contract are excessive, it cannot be said that the contract is unlawful and for a fraudulent object and that, therefore, the unlawfulness of the contract was known to the party from the beginning and was not discovered subsequently.[15]

10. Relief under Contract Act, section 70.—Under S. 70 of the Contract Act, where a person lawfully does anything for another person or delivers anything to him not intending to do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore the thing so done or delivered.

The question has arisen whether this section applies to contracts with the Government which are found to be unenforceable against the Government on account of non-compliance with the prescribed formalities. On this question, there is a difference of opinion. In *Secretary of State* v. *Sarin and Co.*,[1] the Lahore High Court held that compensation under S. 70 of the Contract Act could be granted in such cases. But the Calcutta High Court has taken a different view in *Union of India* v. *Ram Nagina Singh*[2] and held that S. 70 cannot apply to such cases. The reasoning of the Calcutta High Court is that S. 70 of the Contract Act does not apply where there has been a request by a party for the delivery of the thing or for the service for which compensation is claimed from him. According to the Calcutta High Court, where a thing is delivered or a service rendered in response to a request and there is no intention to deliver the thing or render the service gratuitously, an agreement would come into existence and S. 70 will not apply, because that section only contemplates cases in which there is no agreement. Where the agreement fails and is found to be unenforceable due to non-compliance with certain legal requirements, the appropriate section to apply will be S. 65 of the Contract Act.

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[14] 1952 Cal 306 (313) (Pr 58) [AIR V 39 C 80], *Ram Nagina Singh* v. *Governor General in Council.*

[15] 1955 Assam 33 (42, 43) [(S) AIR V 42 C 9] (D B), *N. Purkayastha* v. *Union of India.* (AIR 1938 Bom 54, *Distinguished*—The principle of *in pari delicto* also is not applicable as the Union Government was no party to the fraud.)

Article 299 — Note 10

[1] 1930 Lah 364 (370) [AIR V 17] (DB). (Where a contract for supply of grain was entered into between the plaintiff and the commanding officer of a depot on behalf of the Secretary of State but the contract was found to be invalid under S. 175 (2), Government India Act, 1935, as the commanding officer was not a person who was authorised to enter into contract on behalf of the Secretary of State, it was held that the Secretary of State was liable to make compensation to the plaintiff under S. 70, Contract Act, for the grain supplied by the plaintiff.)

[2] ('55) 89 Cal L Jour 342 (362) (DB). (Reversing on appeal, on this point: AIR 1952 Cal 306.)

11. Ratification. — A contract, entered into by a Government officer on behalf of the Government, but without the requisite authority to do so, may be ratified by the Government and such subsequent ratification, when it is done in the proper form, will be sufficient to make the contract binding on the Government.[1] The principle has been long established that acts done by public servants in the name of the Government may be ratified by subsequent approval in the same way as private transactions.[2] The general principle involved is embodied in S. 196 of the Contract Act.

The above principle of ratification will also apply to cases in which the contract as originally entered into on behalf of the Government is not in the proper *form*.[3] Similarly, an *oral* contract on behalf of the Government is not *void* and is capable of ratification.[4]

12. Collusion. — Under S. 226 of the Contract Act, contracts entered into through an agent and obligations arising from acts done by an agent may be enforced in the same manner and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person. This principle is also applicable to contracts entered into by Government officers on behalf of

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Article 299 — Note 11

[1] 1954 S C 236 (243) (Pr 41) [AIR V 41 C 53] : 1954 S C R 817 (SC), *Chatturbhuj Vithaldas* v. *Moreshwar Parashram*. (In this case, the officer contracting had the authority to contract on behalf of the Government but the contract was not in the proper *form* — It was held that the contract could not be treated as an *utter nullity* and as non-existent for the purpose of determining if a candidate for election to the Legislature who held such a contract was disqualified under S. 7 (d) of the Representation of the People Act.)

1955 Assam 33 (37) (Pr 14) [(S) AIR V 42 C 9] (DB), *N. Purkayastha* v. *Union of India*.

[2] (1861) 8 Moo Ind App 529 (554) (PC), *Collector of Masulipatam* v. *Cavaly Venkatanarainapah*. ("The acts of a Government officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or, if he exceed that authority, when the Government, in fact or in law, directly, or by implication, ratifies the excess.")

(1859) 7 Moo Ind App 476 (540) (PC), *Secretary of State* v. *Kamackee Boye*.

[3] 1954 S C 236 (243) (Pr 41) [AIR V 41 C 53]: 1954 S C R 817 (SC), *Chatturbhuj Vithaldas* v. *Moreshwar Parashram*. (Contract could not be treated as a nullity.)

[4] 1955 NUC (Cal) 4439 [AIR V 42], *Jagu Singh* v. *Shaukat Ali*. (Oral agreement to take house on lease is not void—Payment of rent for premises month after month constitutes ratification—AIR 1954 SC 224 (SC), *Rel. on.*)

the Government, though no doubt subject to the provisions of this article. In this connection it may be recalled that the Supreme Court has held that S. 230 of the Contract Act is applicable to contracts made by Government officers on behalf of the Government, but not in conformity with the provisions of this article and hence not enforceable against the Government.

Where the Government officer acts in fraud of the Government in entering into a contract with another person on behalf of the Government, and the latter acts in good faith and is not a party to the fraud, the Government will be bound by the contract if it is properly drawn up in accordance with this article and the Government officer is acting with the apparent scope of his authority.[1] Where the person with whom the contract is made on behalf of the Government colludes with the Government Officer, who makes the contract, to defraud the Government, the Government will not be bound by the contract. But even in such cases, the contract will only be voidable by the Government and not void.[2]

13. "All contracts". — The article applies to "all contracts made in the exercise of executive power" of the Union or of a State. The article is not confined to purely executory contracts.[1] A letter of guarantee for performance of contract by another is also a contract which must conform to the prescribed formalities under this article.[2]

14. "Contracts made in the exercise of executive power".— A contract made by or on behalf of the Governor-General in carrying on a railway administration is made in the exercise of executive authority, so as to come within S. 175 (3) of the Government of India Act, 1935.[1] It is conceived that transactions which are entirely governed by statutes and statutory rules will not come under this

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Article 299 — Note 12

1. (1904) 2 K B 10 (22) : 73 L J K B 669, *Hambro* v. *Burnand.*

2. 1955 Assam 33 (45, 46) [(S) AIR V 42 C 9] (DB), *N. Purkayastha* v. *Union of India.*

See also Bowstead on Agency, Seventh Edition, 1934, p. 383 where it is said: "Every contract or act made or done by an agent under the influence of bribery, or (to the knowledge of the other party) in violation of his duty to his principal is voidable by the principal."

Article 299 — Note 13

1. *See* 1952 Cal 443 (446) (Pr 35) [AIR V 39], *Sriram Arjundas* v. *Governor-General in Council.*

2. 1955 NUC (Cal) 506 [AIR V 42] (DB), *Union of India* v. *Ramnagina Singh.* (Letter of guarantee given to *B* by Military Garrison Engineer on behalf of Government, for performance of contract by *A* with *B*, must comply with S. 175 (3) of the Government India Act, 1935.)

Article 299 — Note 14

1. 1952 Cal 443 (446) (Pr 36) [AIR V 39], *Sriram Arjundas* v. *Governor-General in Council.*

article though they may be of a commercial nature, or there may be an element of agreement involved. Thus, ordinary service arrangements under Government will not come under this article. (See NOTE 15). Similarly, ordinary dealings, with the State Railway, Post and Telegraph Office, etc., it is conceived, are not governed by this article and do not require a formal contract. Thus, when a person purchases a ticket for travelling on a Government railway, the rights and liabilities of the parties are a matter of *statutory law* and not *contract* and hence, it cannot be said that a document executed in the name of the President is necessary.

15. Contracts of service. — There is a conflict of opinion as to whether this article applies to contracts of service under the Government. One view is that the words "all contracts" in the article must be given their natural meaning and will include contracts of service also, and that in the absence of a contract in the proper form as laid down in this article, a Government servant will not be entitled to enforce in a court of law any rights as such Government servant, including those conferred on Government servants by the Constitution under ART. 311[1]. The other view is that this article has no application to contracts of service of persons in the regular employment of the Government, to whom the provisions of ARTS. 310 and 311 are intended to be applicable.[2] This view was expressed by Teja Singh, C. J., of the Pepsu High Court in *H. S. Bedi* v. *Government of Patiala*[3] where he observed as follows :

> "Lastly, it was urged by the learned counsel for the State that since appointment of the petitioner by the Government as a permanent Executive Engineer amounted to a contract it should have been made in accordance with the provisions of ART. 299, and this not having been done the appointment cannot be recognised. I am prepared to concede that when a Government offers a job to a person and the latter accepts it or when a person applies for a job and the Government agrees to appoint him on that job, there comes into existence a sort of agreement between

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Article 299 — Note 15

[1] 1953 Cal 319 (320) (Pr 6) [AIR V 40 C 111], *Subodh Ranjan* v. *N. A. O. Callaghan.*

1954 Cal 335 (339) (Pr 10) [AIR V 41 C 112], *Lakshmi Narain Gupta* v. *A. N. Puri.*

1936 Bom 19 (23) [AIR V 23] (DB), *Secy. of State* v. *Yadavgir Dharamgir.* (Suit for damages for breach of contract for re-employment will not lie in absence of contract in proper form by Government.)

1937 Bom 449 (451) [AIR V 24] (DB), *Krishnaji Nilkant* v. *Secy. of State.* (Do.)

[2] 1953 Pepsu 196 (199) (Pr 5) [AIR V 40 C 80] : ILR (1953) Patiala 588, *H. S. Bedi* v. *Government of Patiala.*

[3] 1953 Pepsu 196 (199) (Pr 5) [AIR V 40 C 80] : ILR (1953) Patiala 588.

the Government on one hand and the person concerned on the other, but I am not convinced whether such an agreement would come within the purview of the term 'contract' used in ART. 299. The most important thing to note in this connection is that all persons employed by a State or the Union, except those appointed under cl. (2) of ART. 310, hold office during the pleasure of the President or the Governor, as the case may be, and not by virtue of any kind of contract. This is definitely laid down in cl. (1).... Then taking into consideration the fact that ART. 299 forms part of Part XII which relates to finance, property, contract and suits, I am inclined to think that the operation of ART. 299 is limited to contracts relating to property, etc., and in case of persons who join regular service of the Union or a State it is not necessary at all that they should enter into any kind of contract. The object of a contract is to regulate the mutual rights and duties of the parties and as regards persons who are in regular service of Union or a State their rights and duties are laid down in the Constitution and the rules of service framed by the Government under the powers given to them by the Constitution."

It is submitted that except where a person is employed under a special contract, persons in the regular services of the Government are not bound to enter into formal contracts which conform to the formalities laid down in this article, in order to be entitled to the rights and privileges of civil servants under the Government. In this connection, reference may also be made to the decision of the Supreme Court in *Satischandra Anand* v. *Union of India*,[4] in which it was held that ART. 311 of the Constitution was not applicable to a person who was employed under a special contract of service under the Government whose services are terminated by notice under one of the clauses of the contract. In Dicey's THE LAW OF THE CONSTITUTION, 9th Edition 1952, p. 529, it is observed as follows: "It is indeed not certain how far service with the Crown can be regarded as contractual."

See also NOTE 14.

16. Personal liability of the President, Governor or Rajpramukh. — Under cl. (2) of the article, the President, the Governor or the Rajpramukh, as the case may be, is granted immunity from personal liability in respect of Government contracts which are made in his name by public officers. Under ART. 361, the President, Governor or Rajpramukh of a State is granted immunity from personal liability for his official acts. The immunity of the President, Governor or Rajpramukh is purely personal and does not mean the immunity of the Government. Thus, even proceedings for contempt of Court can be taken against the Government.[1]

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[4] 1953 S C 250 (251, 252) (Prs 7, 9) [AIR V 40 C 61] : 1953 S C R 655 (SC).

17. Personal immunity of public servant.—A public servant entering into a contract on behalf of the Government is not personally liable on the contract. This is expressly provided for under cl. (2). The general principle applicable to such cases is also enacted in S. 230 of the Contract Act, which provides that in the absence of any contract to that effect, an agent cannot personally enforce contract entered into by him on behalf of his principal nor is he personally bound by them. Under English law also, the position is the same.[1]

Where, however, the contract made by Government Officer on behalf of Government is found to be unenforceable against the Government on account of its not having been executed in the proper form, the Government Officer, who has executed the contract, will be personally liable under S. 230 (3) of the Contract Act.[2]

300. (1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might

Suits and proceedings.

Article 299 — Note 16

[1] 1954 Pat 513 (521) (Pr 27) [AIR V 41 C 174]: ILR 33 Pat 603: 1954 Cri L Jour 1593 (DB), *State of Bihar* v. *Rani Sonabati*. (State not immune from liability under O. 39, R. 2 (3), Civil P. C. for disobedience of order of injunction passed against it.)

Article 299 — Note 17

[1] (1786) 1 R R 177 (178) : 99 E R 1036, *Macbeath* v. *Haldimand*. (An officer appointed by Government, giving orders in that capacity and under the authority of the Government for supplies for the public service, is not personally liable upon the contracts.)

See also Bowstead on Agency, 7th Edition, 1924, p. 386, where it is said: "No public agent is liable to be sued on any contract made by him on behalf of the Crown or Government; but a public agent is personally liable where he expressly pledges his personal credit, or where he contracts otherwise than as an agent of the Crown or Government."

[2] 1954 S C 236 (243) (Pr 41) [AIR V 41 C 53] : 1954 S C R 817 (SC), *Chatturbhuj Vithaldas* v. *Moreshwar Parashram*.

have sued or been sued if this Constitution had not been enacted.

(2) If at the commencement of this Constitution—

(a) any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and

(b) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings.

GOVERNMENT OF INDIA ACT, 1935

"**176.** (1) The Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province, and, without prejudice to the subsequent provisions of this chapter, may subject to any provisions which may be made by Act of the Federal or a Provincial Legislature enacted by virtue of powers conferred on that Legislature by this Act sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed."

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in ART. 300 references to the State or States shall be construed as not including references to the State of Jammu and Kashmir — The Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

COGNATE PROVISIONS

Cl. (1)—Corresponding Provinces—Interpretation of, see Art. 366 (7).

Cl. (1)—Suits by or against Government—See S. 79 of the Civil Procedure Code, 1908.

Cl. (2)—Commencement of this Constitution—Meaning of—This Constitution came into force on 26-1-1950—See Art. 394.

Cl. (2)—Indian State—Interpretation of, see Art. 366 (15).

SYNOPSIS

1. Analogous law.
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(y) Observations of Privy Council in *High Commissioner for India* v. *I. M. Lall*, examined.
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(zf) Personal injury.
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(zh) Jurisdiction and cause of action, distinction.
(zi) Acts of public servants while exercising statutory authority.
(zj) Summary of discussion.
(zk) Conclusion.
(zl) Power of Legislature to modify provisions of this article as to cases in which Government can sue or be sued — See Note 9.
(zm) Part B States.

4. Suits on contracts.

5. Suits on tort.

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- (b) Negligence of public servants—Injury to persons or property — Damages, suit for.
- (c) Money payable to plaintiff wrongly paid to another person.
- (d) Negligence of hospital employees—Child handed over to unknown person and not traceable.
- (e) Payment of money on forged cheque.
- (f) Loss of property through negligence or fraud of Government servant.
- (g) Misappropriation by Government manager.
- (h) Wrongful arrest and detention by police.
- (i) Wrongful conviction and sentence for imprisonment.
- (j) Trespass to immovable property.
- (k) Commandeering order.
- (l) Order closing labour depot.
- (m) Acts of public servants while exercising statutory authority.

6. Act of State.
7. Acts of Courts.
8. Suit for injunction.
9. Power of Legislature to affect right conferred by this article.
9a. Bar of suit. See Note 9.
10. "Can sue or be sued."
11. Form of suit.
12. Misdescription of parties.
13. Suits involving question of law as to interpretation of the Constitution.
14. Intervention by Attorney-General or Advocate-General.
15. Writ proceedings.
16. Contempt of Court.
17. Proceedings pending at commencement of Constitution (cl. 2).
18. Part B States.
19. Personal exemption of President, Governor and Rajpramukh.
20. State as juristic person.
21. Crown when bound by statute.
22. Royal prerogative.
23. Emergency legislation and sovereign authority.
24. Duty of Executive to obey the law.
25. Suit against State railway.
26. Suit against municipality.
27. Suits against corporations.
28. Liability of high officers of State for acts of subordinates.
29. Personal liability of public officers.
30. Suit for damages against Government by dismissed Government servant for wrongful dismissal — See Article 310 and Notes thereon.
31. Notice.
32. Local jurisdiction of Courts.
33. Suits by or against foreign States.

1. Analogous law.

(a) England.

(a) England.

Before the passing of the Crown Proceedings Act in 1947 (10 & 11 Geo. VI, c. 44), the normal rule of procedure, in regard to claims against the Crown in England, was not by suit, but by Petition of Right and certain other special forms of procedure. The Crown Proceedings Act, 1947 has introduced substantial changes both with regard to procedure as well as to substantive law.[1] (See NOTE 3.)

In *State of Bihar* v. *Abdul Majid*,[2] the position under the Indian Law is compared with the position under the English

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Article 300 — Note 1

[1] Halsbury's Laws of England (Third Edition), Vol 11, pp. 3, 4.

[2] 1954 S C 245 (250) [AIR V 41 C 54] : 1954 S C R 786 (SC).

law and also in Australia and other colonies. The comparative position is stated as follows :

> "The rule of English law that the Crown cannot be sued by a civil servant for money or salary or for compensation has its origin in the feudal theory that the Crown cannot be sued by its vassals or subjects in its own Courts. From this theory the Common Law lawyers in England deduced two rules, namely, (1) that the King can do no wrong, and (2) that as a matter of procedure no action can lie in the King's Courts against the Crown: see Ridge's CONSTITUTIONAL LAW, Eighth Edn., p. 295 and Fraser's CONSTITUTIONAL LAW, p. 164. The subject, in this situation, could only proceed by way of a Petition of Right which required the previous permission of the Crown. Permission was given by a *fiat justitia* issued by the Crown. It was not in practice refused to a petitioner who had any shadow of a claim, so that probably the disadvantages of this form of procedure were more theoretical than substantial.
>
> "Petitions of Right and various other special forms of English procedure applicable exclusively to actions by and against the Crown were abolished by the Crown Proceedings Act, 1947, which provides that in future claims against the Crown might be enforced as of right and without the fiat of His Majesty, and that they should be enforceable by ordinary procedure in accordance with the rules of the High Court or the County Court as the case might be. Arrears of salary were being actually recovered by the procedure of Petition of Right in England: see *Bush* v. *R.*[3] There the judgment resulted in favour of the suppliant. The claim was in respect of the amount of salary due to him as Master o the Court of Queen's Bench in Ireland : Robertson's CIVIL PROCEEDINGS BY OR AGAINST THE CROWN, p. 338.
>
> "In India, from the earliest times, the mode of procedure to proceed against the Crown has been laid down in the Code of Civil Procedure and the procedure of Petition of Right was never adopted in this country, and the same seems to have been the rule in Australia and other Colonies."

(b) Australian Constitution.

(b) Australian Constitution.

Section 56 of the Judiciary Act of 1903 relating to the Commonwealth of Australia, provides:

> "Any person making any claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth in the High Court or in the Supreme Court of the State in which the claim arose."[4]

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[3] ('69) 1869 Times News, May 29.

[4] See 1954 S C 245 (250) [A I R V 41 C 54] : 1954 S C R 786 (S C), *State of Bihar* v. *Abdul Majid*.

Under the New South Wales Act, 39 Vict. No. 38, the Government of the Colony is liable to be sued in an action of tort as well as in contract.

Thus, under the Australian Constitution, as under the Indian Constitution, the ordinary procedure of proceeding by a suit was followed in the case of claims against the Government and the peculiar English procedure of Petition of Right was not required.

(c) The Position prior to the Constitution.

(c) The Position prior to the Constitution.—See Note 3 (a).

2. Scope, object and applicability of article. — This article deals with the subject of suits by or against the Government, Central and State. The article lays down:

(a) That the Government (Central or State) can sue and be sued in a Court of law.

(b) That such suit must be in the name of the Union or the State, as the case may be.

(c) In what cases such suit will lie. (See Notes 3, 4, 5.)

(d) That the provision as to (c) is subject to any enactment by the Parliament or State Legislature.

(e) Procedure to be followed in legal proceedings by or against Government which were pending at the commencement of the Constitution.

Thus the article not only lays down that a suit can be brought by or against the Government but also provides for the *form* of such suits and the matters in relation to which the suit may relate.[1]

In *Venkata Rao* v. *Secretary of State*,[2] their Lordships of the Privy Council observed as follows with regard to S. 32 of the Government of India Act, 1919,[3] the material provisions of which were similar to those of this article:

Article 300 — Note 2

[1] Compare 1950 S C 222 (248) (Pr 116) [AIR V 37 C 18] : 1950 S C R 621 (SC). *Province of Bombay* v. *Khushaldas*. (*Mukherjea J.* — "The first part of the sub-section (S. 176 (1) of the Government of India Act, 1935) relates to parties and procedure and lays down in what form a suit is to be instituted against Government in respect to matters relating to the Federation or Provinces of India. The latter part enacts that subject to any statutory provisions that might be made suits would lie against the Provincial Government in the name of the Province and against the Federal Government in the name of the Federation of India, in relation to their respective affairs where such suits would have lain against the Secretary of State in Council if the Act of 1935 had not been passed.)

[2] 1937 P C 31 (35) [AIR V 24] (PC).

[3] Section 32 of the Government of India Act of 1919, ran as follows:

"(1) The Secretary of State in Council may sue and be sued by the name of the Secretary of State in Council as a body corporate.

(2) Every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company if the Government of India Act, 1858, and this Act had not been passed.

(3) . . . .

(4) . . . ."

"As at present advised, their Lordships are not disposed to think that this section, which is a section relating to parties and procedure, has an effect to limit or bar the right of action of a person entitled to a right against the Government . . . . . ."

Whatever justification there may be for the above observations on the wording of S. 32 (2) of the Government of India Act, 1919 (reproduced in the foot-notes), in so far as the observations may be deemed to suggest that the section only deals with the parties and procedure and not with the substantive question of when the right of action will accrue, they are not applicable to either the provisions of S. 176 of the Government of India Act, 1935, or those of this article, which, as already explained above, not only deal with procedure and form of action but also with the question of substantive law as to when a suit can be brought by or against the Government.

The article contains a specific enactment that the Government can sue and be sued in the ordinary Courts of the land and declares in what cases such suit can be brought. Government is the political organization through which the sovereign will of the State finds expression and through which the State functions. A suit by a citizen against the Government is, thus, in substance, a suit against the State by its own citizen.[4] Sovereignty is an essential attribute of the State, which means that it is the supreme and ultimate authority within its territory and that there is no other authority which its citizens may look for redress if they have any grievance against it. Courts of law derive their existence, jurisdiction and authority from the State itself, and have, therefore, no jurisdiction over it and no authority to pronounce any binding adjudication against it except in so far as the State has consented to submit to their jurisdiction and abide by their decisions. This consent may be found in the constitution of the State itself or in the laws enacted by it or even in the executive orders issued by it.[5] Thus, the provisions of this article represent the consent of the State to submit to the jurisdiction of its own Courts when citizens make claims against it.

The section not only deals with the suits by or against the Central Government but also with suits by or against State Governments.

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[4] 1950 All 206 (207) [A I R V 37 C 79] : I L R (1951) 1 All 135, *Ram Gulam* v. *Government of U. P.*

[5] 1953 Assam 116 (119) [AIR V 40 C 53] (DB), *Union of India* v. *Ram Kamal.*
1950 All 206 (207) [AIR V 37 C 79] : I L R (1951) 1 All 135, *Ram Gulam* v. *Government of U. P.*
('69) 5 Bom H C R (App) 1 (9), *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.* (*Sir Barnes Peacock C. J.*—It is an attribute of sovereignty and a universal law that a State cannot be sued in its own Courts without its consent—See Kent's Commentary, 6th Edn., Vol 1, 297 note; Story on the Constitution of the United States 2nd Edn., p. 1675.)

(a) Test is whether similar suit would have lain against East India Company prior to 1858.

3. In what cases suit will lie against Government—General principles. —Under this article, the Government of India and the Government of a State may "sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted."[1] The position immediately before the Constitution is to be gathered from S. 176 of the Government of India Act, 1935, which, as adapted and modified after the Indian Independence Act, 1947, provided that the Dominion of India and the Provincial Government "may sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if the Government of India Act of 1935 had not been passed." Prior to the adaptation under the Indian Independence Act, the above section (S. 176) of the Government of India Act, 1935 used the word "Federation" instead of the words "Dominion of India."

The position prior to the Government of India Act, 1935, is to be gathered from the Government of India Act of 1915, as amended by the Act of 1919, S. 32 of which provided as follows :

> "Every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company if the Government of India Act, 1858, and this Act had not been passed."

The relevant provision under Government of India Act, 1858 was S. 65 which provided as follows :

> "The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate ; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company; and the property and effects hereby vested in Her Majesty for the purposes of the Government of India, or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would, while vested in the said Company, have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company."

Thus, this article relates back through the successive Government of India Acts, to the legal position immediately before the Act of 1858. Hence, in order to determine whether a suit of a particular

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Article 300 — Note 3

[1] **1954 S C 680 (682, 683) [AIR V 41 C 155] (SC),** ***Bhola Nath J. Thaker* v. *State of Saurashtra.***

kind would lie against the Government it will have to be seen whether the suit is of such a character as would have lain against the East India Company, prior to the Government of India Act of 1858.[2]

The reference in the context is to the character of the suit and not to the question whether under the law as it existed at the time there would have been a valid cause of action for a suit against the East India Company under similar circumstances.[3]

(b) Position of East India Company: its dual character as trading corporation and delegate of British Crown.

The next question that arises is as to what was the nature of the cases in which a suit would have lain against the East India Company prior to the Government of India Act, 1858. For this purpose the position of the East India Company immediately before the passing of the Government of India Act, 1858, should be considered. At that time, the East India Company was occupying a dual position. On the one hand, it was a trading corporation, but on the other, it had also, as a delegate of the British Crown, ruling powers over the territories acquired by the Company in India.[4] The Government of India Act, 1858 transferred to the British Crown the direct control and governance of the Company's territories in India. Till then the territories were vested in the East India Company in trust for the Crown of England.[5] In *Secretary of State in Council of India* v. *Kamachee Boye Sahaba*,[6] Lord Kingsdown observed as follows:

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2. 1950 S C 222 (248) (Pr. 119) [AIR V 37 C 18]: 1950 S C R 621 (SC), *Province of Bombay* v. *Khushaldas. (Mukherjea J.)*

1953 Assam 116 (119) (Prs 23 to 25) [AIR V 40 C 53] (DB), *Union of India* v. *Ram Kamal.*

1950 All 206 (207, 208) (Prs. 10, 11, 12) [AIR V 37 C 79] : ILR (1951) 1 All 135, *Ram Gulam* v. *Government of U. P.*

('69) 5 Bom H C R (App) 1 (6), *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

3. 1937 P C 31 (35) [AIR V 24] (PC), *Venkata Rao* v. *Secretary of State.*

1937 Rang 89 (96, 97) [AIR V 24] (SB), *Secretary of State* v. *J. C Maurice.*

4. (1859) 7 Moo Ind App 476 (530, 531) (PC), *Secretary of State* v. *Kamachee Boye Sahaba.*

('69) 5 Bom H C R (App) 1 (6), *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India.*

(1839) 132 E R 1105 (1109, 1110) : 8 L J C P 193, *Gibson* v. *East India Company.*

5. 1950 S C 222 (248) [A I R V 37 C 18] : 1950 S C R 621 (SC), *Province of Bombay* v. *Khushaldas.*

('69) 5 Bom H C R (App) 1 (5), *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[*See* 1954 Pat 513 (517, 518) [AIR V 41 C 174] : I L R 33 Pat 603 : 1954 Cri L Jour 1593 (DB), *State of Bihar* v. *Sonabati Kumari.*

1953 Assam 116 (119) (Prs 23 to 25) [AIR V 40 C 53] (DB), *Union of India* v. *Ram Kamal.*]

6. (1859) 7 Moo Ind App 476 (530, 531) (PC).

"The careful and able review of the several Charters and Acts of Parliament bearing upon the subject which they had the advantage of hearing at the Bar, has satisfied them that the law, as it stood in the year 1839, is accurately stated in the following passage in the judgment of Chief Justice Tindal in the case of *Gibson* v. *The East India Company*[7] in which after referring to various legislative enactments he observes that from these it is manifest that the East India Company have been invested with powers and privileges of a twofold nature, perfectly distinct from each other; namely, powers to carry on trade as merchants, and (subject only to the prerogative of the Crown, to be exercised by the Board of Commissioners for the affairs of India), power to acquire and retain and govern territory, to raise and maintain armed forces by sea and land, and to make peace or war with the Native powers of India . . . . .

"The subsequent Statute, 3rd and 4th Will IV, c. 85, in no degree diminishes an authority of the East India Company to exercise, on behalf of the Crown of Great Britain, and subject to the control thereby provided, these delegated powers of Sovereignty."

(c) Effect of above position.

The next question is, what was the effect of this double character of the East India Company on its liability to be sued in a Court of law? Did the fact that the Company was invested, as a delegate of the British Crown, with powers which are usually called sovereign powers carry with it the consequence that it was also entitled to the immunities of the British Crown in this respect?

(d) Position of British Crown at time of Act of 1858.

In this connection, it is first necessary to consider the position of the British Crown at the time when the Government of India Act, 1858, was passed. Before the Crown Proceedings Act, 1947, was passed, the general rule of English law was that no proceeding, civil or criminal, was maintainable against the Sovereign, for, it was said, that the Courts, being the King's own, would have no jurisdiction over him. In the Introduction to the Dicey's CONSTITUTION,[8] the position is stated as follows :

"Neither against the Sovereign in respect of his personal acts, nor against the Crown as representing a legal conception, the sum-total of prerogatives and other powers and rights of Government, can an action lie or a prosecution be brought, save only in the few cases where Parliament has expressly so provided."

The following passage from HALSBURY'S LAWS OF ENGLAND,[9] also may be quoted here to show the position of the Crown in England under the Common Law :

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[7] (1839) 132 E R 1105 : 8 L J C P 193.

[8] Introduction to the Study of the Law of the Constitution, 9th Edition (1952) (Introduction) cxlvii.

[9] Halsbury's Laws of England, 3rd Edition (Simonds), Vol 11, page 3.

> "Under the general rule at Common law no proceeding, civil or criminal, was maintainable against the Sovereign in person for, it was said, the Courts, being the King's own, could have no jurisdiction over him. The only methods by which, before the passing of the Crown Proceedings Act, 1947, redress might be sought against the Crown in the Courts were by way of petition of right which was dependent on the grant of the royal fiat; by suits against the Attorney-General for a declaration; or by actions against Ministers and Government department which had been incorporated or declared liable to suit by statute. The Crown enjoyed numerous immunities and privileges, in particular immunity from liability for damages for torts committed by Crown Servants."

As a result of the Crown Proceedings Act, 1947, the law in England as to proceedings against the Crown has undergone considerable change both as regards procedure and substantive matters. The Act has abolished (subject to certain exceptions) the special forms of procedure which previously governed civil proceedings by and against the Crown. The Act also (subject to certain exceptions) enables civil proceedings to be taken against the Crown in the same circumstances as they can be taken against a subject. The principal alteration in substantive law brought about by the Act is in relation to the immunity of the Crown in tort. Previously by virtue of the legal fiction that the King can do no wrong, the Crown was not liable for damages for torts committed by the Crown or by servants of the Crown. Since that Act, the Crown is subject to liability in tort in respect of His Majesty's Government in the United Kingdom to much the same extent, subject to certain limitations or savings, as that to which it would be subject if it were a private person of full age and capacity.[10]

But, as already stated, the question to be considered in connection with the liability of the East India Company to be sued, immediately before the Government of India Act, 1858, relates to the position of the British Crown (from which the East India Company had derived its powers of Government of Indian territories) *at that time*. Hence, the changes in the law made by the Crown Proceedings Act, 1947, are not material for the present discussion.

(e) Immunity of British Crown from being sued is not applicable to East India Company.

The question, then, is to what extent the immunities and privileges of the British Crown (as they existed immediately before the Government of India Act, 1858) in regard to legal proceedings against the Crown, were applicable to the East India Company at that time. On this question, the very fact that S. 65 of the Government of India Act, 1858 expressly provides that all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the East India Company, necessarily indicates that in the opinion of the British Parliament, the immunity of the British Crown from the liability to be *sued* in its own Courts did not apply to the East India Company. It is also the established position on the authorities that the East India Company was not immune from the liability to be *sued* in its own Courts.[11] The object of S. 65 of the Government of India Act, 1858 was this : Under that Act, the Government of India, which was previously vested in the East India Company, as a delegate of the British Crown, was transferred directly to the control of the Crown. As the British Crown was immune from suits by subjects but the East India Company till then had not been entitled to any such immunity, Section 65 of the Government of India Act, 1858 enacted in effect that notwithstanding a transfer of control directly to the Crown, this must not make a difference to the rights of the subject to pursue his remedies against the Government.[12]

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[10] Halsbury's Laws of England, 3rd Edition (Simonds), Vol 11, P. 4.

(f) Nature of cases in which East India Company could have been sued; liability not confined to cases in which remedy by petition of right or otherwise would have lain against British Crown.

The next question is, what is the nature of the cases in which a suit would have lain against the East India Company. (As already stated, suits against the Government under this article would lie in cases of the same character.) The question that arises in this connection is whether the liability of the East India Company to be sued in its own Courts by a subject was limited to cases in which a remedy would have lain against the British Crown, by way of petition of right or otherwise. On this question, it is established that no such limitation applied and that a suit could lie against the East India Company even in cases in which the British Crown would not have been liable on a petition of right or otherwise.[13] This was clearly and unequivocally laid down by Sir Barnes Peacock, C. J., delivering the judgment of the Supreme Court of Calcutta in *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India.*[14] In that case the question was about the liability of the Government for damages for the negligence of its servants. It was contended on behalf of the defendant that a State cannot be made liable for damages occasioned by the negligence of its officers or persons employed in its service. This proposition was conceded by Sir Barnes Peacock, C. J., who pointed out that it is an attribute of sovereignty and a universal law that a State cannot be sued in its own Courts without its consent. He further pointed out that the Crown in England could not be made liable for such damages either by petition of right or in any other manner. But he held that in determining the question whether the East India Company would under the circumstances have been liable to an action the general principles applicable to sovereigns and States and the reasoning deduced from the maxim of the English law that the King can do no wrong would have no force. He expressed his entire concurrence with the opinion expressed by Chief Justice Grey in the case of *The Bank of Bengal* v. *The East India Company*[15] that the fact of the Company's having been invested with powers usually called sovereign powers did not constitute them sovereigns. He concluded as follows *(p. 14 of 5 Bom. H. C. R. (App.) 1)* :

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[11] ('69) 5 Bom H C R (App) 1 ([illegible], 10), *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[12] ('69) 5 Bom H C R (App) 1 (5), *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.* ("As the Queen could not be sued as the East India Company could have been in her Court, it was necessary to provide for the mode of enforcing such liabilities".)

1950 S C 222 (248) (Pr 118) [AIR V 37 C 18] : 1950 S C R 621 (SC), *Province of Bombay* v. *Khushaldas.*

('13) ILR 40 Cal 391 (399) (PC), *Secretary of State* v. *Moment.*

[13] *See* (1887) 12 App Cas 643 (649, 650) : 56 L J P C 72, *Farnell* v. *Bowman.* ((1) Subjects in colonies not restricted to actions in cases in which there was a remedy by Petition of Right against the Crown. (2) Dictum in *Hettihewage Siman Appu* v. *The Queen's Advocate,* (1884) 9 App Cas 571, that no suit would lie against Government for torts should be treated as limited to the Ceylon Ordinances and not as a general proposition.)

> "We are of opinion that for accidents like this, if caused by the negligence of servants employed by Government, the East India Company would have been liable, both before and after the 3 and 4 William IV, c. 85, and that the same liability attaches to the Secretary of State in Council, who is liable to be sued for the purpose of obtaining satisfaction out of the revenues of India."

(g) Does liability extend to all cases in which a private person would be liable?

But this does not conclude the question as to the character of the cases in which a suit would have lain against the East India Company prior to 1858 and would, therefore, be now maintainable against the Government, under this article, for the question still arises whether the East India Company could have been sued in *all* cases in which under similar circumstances, a suit would have lain against a private individual or whether there were any special limitations, in this respect which are not applicable to suits against private individuals.

(h) Conflict of decisions: Observations of Sir Barnes Peacock C. J. in P. & O. Company's case.

This question has given rise to a conflict of decisions. Taking into consideration the reasoning given in the several decisions, it appears that the conflict mainly arises out of certain observations of

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[14] ('69) 5 Bom H C R (App) 1 (10).

[15] Bignell Rep. p. 12.

Sir Barnes Peacock, C. J., in *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India.*[16] In that case, the plaintiff sued the Secretary of State for India for damages for negligence of certain persons employed under the Government and engaged in work connected with the repair of a steamer in the Government docks. It was contended on the part of the defendant that a State cannot be liable for damages occasioned by the negligence of its officers or of persons employed in its service. While this proposition was conceded by the Court, it was held that the principle was not applicable to the East India Company and therefore to the Secretary of State, inasmuch as the East India Company, although invested with powers usually called sovereign powers, was not thereby constituted sovereign. The Chief Justice then proceeded to explain how the East India Company even as a body entrusted with the government of the Country had to engage in undertakings partaking more of the character of private business than affairs of State. His Lordship drew a distinction between acts of the Government which were of a sovereign character and those which were in the nature of private business although performed in the exercise of a governmental function. His Lordship held that the latter class of acts were clearly acts in respect of which the Government could be sued in the same way as private individuals. On this reasoning, his Lordship held that the negligence of the Government servants, in respect of which the damages were claimed in the particular case, was committed in the course of a transaction in the nature of private business and so, the suit against the Secretary of State was maintainable. In this connection his Lordship observed as follows :

> "We are. . . . of opinion that the East India Company were not sovereigns, and, therefore, could not claim all the exemptions of a sovereign; and that they were not the public servants of Government, and, therefore, did not fall under the purview of the cases with regard to the liabilities of such persons; but they were a company to whom sovereign powers were delegated, and who traded on their own account and for their own benefit and were engaged in transactions partly for the purpose of Government and partly on their own account, which, without any delegation of sovereign rights, might be carried on by private individuals. There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them."

Then after citing *Moodalay* v. *Morton*[17] to show that the East

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16. ('69) 5 Bom H C R (App) 1 (15, 16).

17. (1785) 28 E R 1245 : 1 Bro CC 469.

India Company was liable to be sued in respect of transactions of the character of private business, his Lordship proceeded to observe :

> "But where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a Sovereign, or private individual delegated by a Sovereign to exercise them, no action will lie."

(i) Question in controversy.

So far as the proposition that a suit will lie against the Government in regard to acts done in the course of transactions of a private nature, there has been no controversy and the point may be taken as settled beyond any shadow of doubt. But as regards transactions of the Government which do not fall in this category but constitute the exercise of powers usually called sovereign powers, that is, in the words of Sir Barnes Peacock, C. J., "powers which cannot be lawfully exercised except by a Sovereign, or a private individual delegated by a Sovereign to exercise them," there is much divergence of judicial opinion as to the maintainability of an action against the Government in regard to acts done by the Government or its agents in the course of such transactions.

It will be seen that in the *Peninsular and Oriental Steam Navigation Company's case*,[18] the act in respect of which relief was sought in the suit was held by the Court to have been done in the course of an undertaking of a private nature. There was, therefore, no question before the Court with regard to the maintainability of an action in respect of an act of "sovereign" nature.[19] Hence, the expression of opinion by Sir Barnes Peacock, C. J., at the end of the passage quoted above was, strictly speaking, in the nature of an *obiter dictum*, but still, it seems to form part and parcel of a *single* proposition of law laid down by his Lordship, although the proposition consists of two parts, one of which alone was directly applicable to the facts of the case then before the Court.

(j) Two broad groups of decisions.

The decisions on the questions fall broadly into two groups. According to the view expressed in one group of decisions the Government is not, as a general rule, liable to be sued in regard to acts which are done in the exercise of powers which are usually called sovereign powers, that is, powers which cannot be lawfully exercised except by a Sovereign, or private individual delegated by a Sovereign to exercise them. Various exceptions are recognized to this general rule. But the general principle inculcated in these decisions is as stated above.

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[18] ('69) 5 Bom H C R (App) 1, *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[19] 1950 S C 222 (248) [AIR V 37 C 18] : 1950 S C R 621 (SC), *Province of Bombay* v. *Khushaldas.*

According to the view expressed in the other group of cases, the test of distinction between a sovereign and non-sovereign acts of the Government is not a sound one for the purpose of determining whether a suit will lie against the Government. According to this view, except where the act in question is an act of State, that is, one which is not done under a municipal law at all, a suit will lie against the Government in all cases in which such a suit will lie against a private person.

(k) First view: Government not liable to suit in regard to acts done in exercise of sovereign powers.

As regards the first group, the leading decision which is also the earliest one, may be said to be that in *Nobin Chunder Dey* v. *Secretary of State.*[20] In that case, the plaintiff was the highest bidder at a sale of licences for selling certain excisable liquors and drugs. He paid the deposit upon his purchase and did all that was necessary to entitle him to the licences. But in spite of his demand from the Government officials concerned he failed to obtain the licences. Further, although he paid the duties upon certain excisable articles of the same character kept in his godowns, he could not obtain from the Government officers the necessary papers to enable him to obtain the articles. The consequence was that he was obliged to close his shop. He filed a suit against the Government for damages or, in the alternative, for refund of the deposit made by him on the purchase of the licences. It was held by the Calcutta High Court that the suit was not maintainable. In doing so, the Court relied on the observations of Sir Barnes Peacock, C. J., in the *Peninsular and Oriental Steam Navigation Company's case.*[21]

Chief Justice Garth, who delivered the judgment of the Court, expressed his complete concurrence with the principle laid down in the *Peninsular and Oriental Steam Navigation Co.'s case*[22] that where an act is done or contract entered into in the exercise of powers usually called sovereign powers, that is, powers which cannot be lawfully exercised except by a Sovereign or a private individual delegated by a Sovereign to exercise them, no action will lie. In applying the principle to the case before the Court, Garth, C. J., observed as follows:

> "The persons who are said to have been guilty of the acts and default of which he (plaintiff) complains, are the officers employed in that department of the Government service which relates to the imposition and collection of the excise duties. The ground of the complaint is that those officers have been guilty of various breaches

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[20] ('76) ILR 1 Cal 11 (26, 27) (DB).

[21] ('69) 5 Bom H C R (App) 1 (15, 16), *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[22] ('69) 5 Bom H C R (App) 1, *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

of the duty in not fulfilling obligations to the plaintiff which they were bound to fulfil in that capacity.

> "Now it is impossible to doubt for a moment that the laws which are made in this or any other country for the taxation of the subject by the imposition of customs and duties, are laws which can only be made or enforced in the exercise of sovereign powers properly so called; and these sales, at which the plaintiff contends that he purchased the rights on which he claims, only constitute a portion of the machinery and arrangements by which the imposition and collection of the excise duties are regulated in this country. His claim is, therefore, clearly one of those, which cannot be enforced against the Government of India."

It must be noted that in the above case, the plaintiff based his suit on allegation of *breach of contract* by the Government, Notwithstanding this, on the reasoning that the transaction was entered into in the exercise of sovereign powers, the suit against the Government was held not to be maintainable. In this connection, the observations of Phear, J., which were approved of by Garth, C. J., in the appeal, may be quoted :

> "If, however, the contract and breach, as the plaintiff thus puts them, be assumed, it seems to me that no action in respect of them lies against the Government. The matter involved in them is clearly, I think, not in any degree an undertaking which might be carried on by private individuals without sovereign powers. The contract was only part of the administrative contrivance and arrangement by which the Government is accustomed to collect the excise duties, and the levying of the excise duties and other portions of the public revenue certainly could not lawfully be done by private persons not delegated by the Sovereign to do so. On this ground, then, I think the plaintiff's suit must be dismissed with costs."

The undermentioned cases[23] also draw a distinction between acts done in the conduct of undertakings which can be carried on by private persons and those done in the exercise of powers which can be lawfully exercised only by a sovereign body or its delegates. According to these decisions, while a suit will lie against the

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[23] 1932 Cal 834 (841) [AIR V 19] (DB), *Secretary of State* v. *Sri Gobinda Chaudhury*. (The Secretary of State for India cannot be sued in respect of an act of a subordinate in the exercise of *sovereign or Government power* Hence the case of a plaintiff, whose estate was released from the management of the Court of Wards complaining that the Manager appointed by the Court of Wards has not done his duty by realizing all money with diligence or has not accounted to the Court of Wards for certain moneys which he collected is not a case in which the plaintiff can make the Secretary of State or the revenue of India liable. His suit against the Secretary of State is therefore not maintainable.)
1954 Pat 529 (Prs 17, 23, 33, 41, 44, 45, 46) [AIR V 41 C 177] (DB), *District Board, Bhagalpur* v. *Province of Bihar*. (Damages for negligence of public servant—No suit.)

1954 Pat 513 (518) (Pr 15) [AIR V 41 C 174] : ILR 33 Pat 603 : 1954 Cri L Jour 1593 (DB), *State of Bihar* v. *Sonabati Kumari.*

1953 Assam 116 (127) (Pr 66) [AIR V 40 C 53]. *Union of India* v. *Ram Kamal.*

1953 Cal 1 (10) [AIR V 40 C 1], *Calcutta Motor Cycle Co.* v. *Union of India.* (The distinction between governmental functions of sovereign character and non-governmental functions still remains a valid test by which to determine the justiciable character of any particular act or conduct of the Government in spite of the difficulty of applying that test in a welfare State with its new patterns of social and public services. The reasons for upholding that test is founded primarily on the juristic concept that sovereign governmental actions unless excluded from the scrutiny of Courts will mean creating a new right which no jurisprudence of any country has recognised except by special constitutional writs, and secondarily on the fact that unless so excluded it will involve the practical difficulty or constant interference with administration and invasion of public funds rendering any Government or administration impossible.)

1952 Nag 213 (215) [AIR V 39 C 60] : ILR (1949) Nag 875 (882) (DB). *Secretary of State* v. *Sheoramjee.* (In this case, the act complained of was held to arise out of a commercial or mercantile function and so the suit against the Government was held maintainable.)

('47) ILR (1947) 2 Cal 141 (146, 147) (DB), *Udaychand Mahtab* v. *Province of Bengal.* (Collector paying out sale proceeds of patni sale to wrong person — No suit will be against Government.)

1943 Nag 287 (288, 289) [AIR V 30], *Secretary of State for India in Council* v. *Nagorao.* (No suit will lie against Government for use of land as practice bombing ground by the army.)

1942 Mad 539 (549, 550) [AIR V 29] : 44 Cri L Jour 45 (DB), *Gurucharan Kaur* v. *Madras Province.* (Wrongful arrest and detention by Police Officer—No suit.)

1939 Mad 663 (666) [AIR V 26] (DB), *Etti* v. *Secretary of State.* (Government Hospital — Child handed over to wrong persons and lost through negligence of hospital employees — No suit will lie against Government for damages — Maintenance of hospital is sovereign function.)

1928 Cal 74 (81) [AIR V 15], *Kessoram Poddar* v. *Secretary of State.* (A commandeering order is one which no one but Government can make, and being an act of the Sovereign, the Secretary of State evidently cannot be sued in respect of it— Commandeering order requiring plaintiff to place goods at disposal of Government—Failure of Government to take the goods and pay for them—No suit will lie against Government.)

1915 Mad 993 (994) [AIR V 2] (DB), *Secretary of State* v. *Cockraft.* (Damages for negligence—No suit.)

1915 Mad 434 (441) [AIR V 2], *Ross* v. *Secretary of State.* (No suit for damages for order of Collector to close down labour recruitment depot.)

('11) ILR 38 Cal 797 (800, 801) (DB), *Mc Inerny* v. *Secretary of State for India.* (Damages for negligence—No suit.)

[*See also* 1952 Assam 159 (166) [AIR V 39] : ILR (1952) 4 Assam 275 (DB), *Union of India* v. *Mohimchandra.* (Only immunity is in respect of act done in exercise of sovereign functions.)

(1839) 132 E R 1105 (1109, 1110) : 8 L J C P 193, *Gibson* v. *East India Company.* (No suit would lie against East India Company for arrears of pension payable under Regulations of Company.)]

Government in all cases of the former class, a suit will not lie against the Government in the latter type of cases except in certain cases. The exceptions usually recognised are cases of detention of land, chattels, or money or of trespass to property, or cases where the Government has authorised or ratified the act or has made a profit or gain out of the wrong committed by its servant.

The distinction between acts of Government servants done in the exercise of "sovereign powers" and acts done in the course of undertakings of the Government of the character of private business may be said to have also been recognised and given effect to in the undermentioned cases,[24] in which it has been held that subject to certain exceptions, no suit for *torts* will lie against the Government in regard to acts done by its servants in the exercise of "sovereign powers."

On the other side of the line, the leading decision is that of the Madras High Court in *Secretary of State* v. *Hari Bhanji*[25] (a judgment of Sir Charles Turner, C. J., and Muttuswami Ayyar J.) in which the decision of the Calcutta High Court in *Nobin Chunder Dey* v. *Secretary of State*[26] was expressly dissented from. According to the Madras High Court in the above case, it is only acts in the exercise of sovereign powers *which do not profess to be justified by municipal law*, that are excluded from the cognizance of the municipal Courts of the country. Where an act complained of is professedly done under the sanction of municipal law and in the exercise of powers conferred by that law, the fact that it is done in the exercise of what are usually called sovereign powers and is not an act which could possibly be done by a private individual does not oust the jurisdiction of the civil Courts.

(1) Second View : Except in case of Act of State, Government liable to be sued in all cases in which suit would lie against private persons.

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[24] 1954 S C 245 (251) [AIR V 41 C 54] : 1954 S C R 786 (S C), *State of Bihar* v. *Abdul Majid*. (As regards *torts* of its servants in exercise of *sovereign powers*, the Company was not, and the Crown in India was not, liable unless the act had been *ordered or ratified by it.*)

1953 Assam 116 (Pr 55) [AIR V 40 C 53] (DB), *Union of India* v. *Ram Kamal.*

1931 Oudh 29 (31) [A I R V 18] (DB), *Mata Prasad* v. *Secretary of State.* (The rule which makes masters or principals responsible for the torts committed by their servants or agents in the course of their employment is inapplicable in the *case of the Crown*: AIR 1915 Mad 434, Ref.—Postmaster accused of embezzlement of money, postage stamps and other articles in post office — His case was that there was dacoity in the office—Report to Police — Report found to be false — Prosecution for giving false report and for embezzlement—Conviction and sentence — Afterwards in another case, the approver saying that he had been involved in dacoity in the post office—The postmaster suing Secretary of State for damages—Held suit did not lie.)

1931 Rang 294 (300) [AIR V 18] (DB), *Kader Zailany* v. *Secretary of State.*

('04) ILR 28 Bom 314 (323) (DB), *Shiva Bhajan Durga Prasad* v. *Secretary of State.* (Misappropriation by public servant.)

[25] ('82) ILR 5 Mad 273 (279, 283) (DB).

[26] ('76) ILR 1 Cal 11 (DB).

The suit in that case was for the recovery of certain sums of money which the plaintiff had been compelled to pay as excise duty, but which were really not leviable from him under the law. The defendant contended that the act in respect of which the suit was brought was one done in the exercise of sovereign powers of the Government and hence, on the authority of *Nobin Chunder Dey's case*,[27] the Court had no jurisdiction to entertain the suit. The contention was rejected and it was held that the Court had jurisdiction to entertain the suit. The decision in *Nobin Chunder Dey's case*[28] was, as already stated, expressly dissented from. The Madras High Court observed as follows in the course of the judgment :

> "Two principal rules regulate the maintenance of proceedings at law by a subject against a sovereign, the one having relation to the personal status of the defendant, the other to the character of the act in respect of which relief is sought . . . . .
>
> "The East India Company was not a sovereign, and the personal exemption from suit which is the attribute of sovereignty did not attach to it . . . . Not only was the Company liable to suit in the Courts of the Sovereign, but it also submitted to the jurisdiction of its own Courts (Regulation III of 1793, Bengal, Preamble).
>
> "On the assumption by the Crown of the direct government of British India it was provided that persons should have the same suits and remedies against the Secretary of State in Council as they had theretofore been entitled to maintain and pursue against the Company. Consequently, the Secretary of State in Council cannot, in this country, claim on behalf of the Crown the prerogative of immunity from suit . . . .
>
> "The second rule to which we have referred as having relation to the nature of the act complained of is the rule that municipal Courts have no jurisdiction to entertain claims against the Government arising out of Acts of State. What is the sense in which the term 'Act of State' is to be understood in this rule? In one sense all acts done by the officers of the Government in the exercise of powers committed to them for purposes of administration and which cannot legally be done by private persons may be termed, Acts of State.
>
> "There are cases in which it has been held that the East India Company was amenable to the municipal Courts on the ground that the acts complained of were committed in the conduct of undertakings which might be carried on by private persons: *The Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India.*[29]

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27. ('76) ILR 1 Cal 11 (DB), *Nobin Chunder Dey* v. *Secretary of State.*

28. ('76) ILR 1 Cal 11 (DB), *Nobin Chunder Dey* v. *Secretarg of State.*

29. ('69) 5 Bom H C R (App) 1.

"In those cases, it was not necessary to do more than to call attention to the general distinction between acts done in the exercise of powers usually termed 'sovereign' and acts done in the conduct of undertakings which might be carried on by persons who enjoyed no delegated powers of sovereignty.

"In the conduct of the commercial operations of the Company, the occurrence of actionable wrong could hardly be altogether avoided, and it was obvious that no character of sovereignty attached to such operations. But the decision in the case of *Nobin Chunder Dey*[30] goes beyond the decisions to which we have referred. It is apparent that the learned Judges had in view the able judgment in *The Peninsular and Oriental Steam Navigation Company* v. *The Secretary of State for India;*[31] but whereas in that case after noticing the distinction above mentioned the Court held that exemption from suit could not be claimed in respect of the latter class of acts and expressed no opinion that all acts of the former class would enjoy such immunity, in *Nobin Chunder Dey's case*[32] it has been ruled that the liability of the Government or of its officers to suit is restricted to acts of the latter class. It appears to us that this position cannot be maintained, and that the decided cases show that in the class of acts which are competent to the Government and not to any private person, a distinction taken is between those which lie outside the province of municipal law and those which fall within that law, and that it is of the former only that in this country the municipal courts in British India cannot take cognizance."

Jehangir v. *Secretary of State*[33] is another important decision on the same side of the line. In that case also, the principle was affirmed that where the act of the Government is done under a municipal law, the jurisdiction of Courts is not excluded on the ground that the act is such as can only be done by sovereign authority or by the agent of such authority and not by a private person. Batty, J., observed as follows in that case :

"The test whether an act is or is not an Act of State excluding the jurisdiction of the Courts is not whether it is capable of being legally performed only by persons specially empowered in that behalf as authorised by the law to perform specific acts of the Government, but whether it is an act of the State in those external relations which municipal or positive law addressed by political superiors to political inferiors does not profess to regulate."

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[30] ('76) ILR 1 Cal 11 (DB), *Nobin Chunder Dey* v. *Secretary of State.*

[31] ('69) 5 Bom H C R (App) 1, *P. & O. Steam Navigation & Co.* v. *Secretary of State.*

[32] ('76) ILR 1 Cal 11 (DB), *Nobin Chunder Dey* v. *Secretary of State.*

[33] ('04) 6 Bom L R 131 (140, 141) (DB).

The same principle was also affirmed by the Assam High Court in *Union of India* v. *Murlidhar Agarwalla.*[34]

The above view was also expressed by B. K. Mukherjea, J., in the *Province of Bombay* v. *Khushaldas Advani*,[35] in which he observed as follows :

> "It is true that the East India Company was invested with powers and functions of a two-fold character. They had on the one hand powers to carry on trade as merchants; on the other hand they had delegated to them powers to acquire, retain and govern territories to raise and maintain armies and to make peace and war with native powers in India. But the liability of the East India Company to be sued was not restricted altogether to claims arising out of undertakings which might be carried on by private persons; but other claims if not arising out of Acts of State could be entertained by civil courts, if the acts were done under sanction of municipal law and in exercise of powers conferred by such law."

His Lordship cited the decision of the Madras High Court in *Secretary of State for India* v. *Hari Bhanji*,[36] in support of his view. As regards the observation of Sir Barnes Peacock in *Peninsular and Oriental Steam Navigation Co's case*,[37] discussed above in this Note, his Lordship observed :

> "Much importance cannot, in my opinion, be attached to the observation of Sir Barnes Peacock in *Peninsular and Oriental Steam Navigation Company* v. *The Secretary of State for India.*[38] In that case, the only point for consideration was whether in the case of a tort committed in the conduct of a business the Secretary of State for India could be sued. The question was answered in the affirmative. Whether he could be sued in cases not connected with the conduct of a business or commercial undertaking was not really a question for the Court to decide."

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[34] 1952 Assam 141 (145, 146) (Prs 26, 27) [AIR V 39] : ILR (1951) 3 Assam 279 (DB). (The Union of India is liable to be sued for all acts arising out of breaches of the municipal law in the same way as a private individual: *Case law discussed.*

In this view the Union of India can be sued for conversion of a large quantity of earth dug and removed from the land belonging to the plaintiff and laid on the railway track — *Note* — Thadani C. J. held this view—Ram Labhaya J. agreed with the *conclusion* of Thadani C. J. But in a later case, AIR 1953 Assam 116, Ram Labhaya J. held that as a general rule the State is not liable for torts of its servants but this immunity is subject to exceptions in cases of trespass, etc.)

[35] 1950 S C 222 (248, 249) [AIR V 37 C 18] : 1950 S C R 621 (S C).

[36] ('82) I L R 5 Mad 273 (D B).

[37] ('69) 5 Bom H C R (App) 1, *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[38] ('69) 5 Bom H C R (App) 1.

In the above case, Mukherjea, J., expressed his complete agreement with the reasoning of the Bombay High Court[39] in the lower court. Chagla, C. J.'s observation may, therefore, be appropriately quoted here :

> "An Act of State is different fundamentally from an act of a sovereign authority. An Act of State operates extra-territorially. Its legal title is not any municipal law but the overriding sovereignty of the State. It does not deal with the subjects of the State but deals with aliens or foreigners who cannot seek the protection of the municipal law. It is difficult to conceive of an Act of State as between a sovereign and his subjects. If Government justifies its act under colour of title and that title arises from a municipal law, that act can never be an Act of State. Its legality and validity must be tested by the municipal law and in municipal Courts."

The undermentioned decisions[40] may also be treated as proceeding on the principle that the test of liability of the Government to be

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39. 1949 Bom 277 (287) (Pr 11) [AIR V 36 C 77] : I L R (1950) Bom 1 (D B), *P. V. Rao* v. *Khushaldas S. Advani.*

40. 1954 Bom 129 (130) (Pr 4) [AIR V 41 C 33] : I L R (1953) Bom 1157 (DB), *Bata Shoe Company* v. *Union of India.* (Secretary of State for India liable for negligence of Government servants if negligence is such as would render ordinary employer liable.)

1954 Cal 591 (597) (Pr 18) [AIR V 41 C 202] : 1954 Cri L Jour 1722 (DB), *Shri Krishna Sharma* v. *The State of West Bengal.* (The term 'Act of State' is sometimes used loosely to express any lawful act done by the Executive Government and if it affects the person or property of subjects within its jurisdiction its legality can be questioned in municipal Courts.)

1928 Lah 346 (347) [AIR V 15] (DB). *John Vectis Carew Wyllie* v. *Secretary of State.* (Suit for damages will lie against Secretary of State for personal injury caused to plaintiff by public nuisance.)

1915 Bom 227 (227) [AIR V 2] (D B), *Wasappa Timappa* v. *Secretary of State.* (Property illegally attached and sold by Magistrate under S. 523, Criminal P. C. —Suit for recovery of price lies against Government.)

('13) I L R 40 Cal 452 (456, 457) (DB), *Kailash Chandra Nag* v. *Secretary of State for India.* (Punitive Police—Costs illegally realised from plaintiff — Suit will lie for recovery of such costs.)

[*See also* 1937 Lah 572 (573) [AIR V 24] (DB), *Oma Parshad* v. *Secretary of State.* (Possession taken under colour of legal title—No Act of State.)

1934 Bom 277 (294) [AIR V 21], *Municipal Corporation Bombay* v. *Secretary of State.* (An 'Act of State' is a term which is not applicable to an action of the Sovereign towards its own subject in its own territory in time of peace. The expression is usually applied to an action of the Sovereign towards foreign subjects whether it be in time of war or in time of peace. There can be an Act of State as between the Sovereign and its own subject in time of war. It would however be a misnomer to call the *administrative acts of a Sovereign* against its own subjects in time of peace as Acts of State and to claim immunity in respect of them although they may amount to a contract in the ordinary sense between the Sovereign and his subjects.)]

sued in its own courts is whether the act or the omission complained of is governed by the municipal law of the country or whether it is an 'Act of State' in the strict sense of the term, which is beyond the purview of municipal law.

(m) Which is the true view: Question posed.

It may now be considered what is the true view in this matter. As already seen the controversy has mainly centred round the question how far the second proposition contained in the observations of Sir Barnes Peacock, C. J., in the *Peninsular and Oriental Steam Navigation Co.'s case*[41] can be regarded as laying down the correct law. The proposition has been expressed as follows :

> "Where an act is done or a contract is entered into in the exercise of powers usually called sovereign powers, by which we mean powers, which cannot be lawfully exercised except by a Sovereign, or private individual delegated by a Sovereign to exercise them, no action will lie."

The question, thus, is whether it is correct to state as a broad and unqualified proposition that in all cases in which the act, to which the suit against the Government relates, has been done in the exercise of powers which can only be lawfully exercised by a Sovereign or his agent and not by a private individual, the suit would be incompetent.

(n) Effect of observations in P. & O. Company's Case.

In this connection, it is necessary to appraise exactly, what the principles as laid down by Sir Barnes Peacock, C. J., in *P. and O. S. N. Co.'s case*[42] were. In the *Secretary of State for India in Council* v. *Hari Bhanji*,[43] it has been stated that in the *P. and O. S. N. Co.'s case*,[44] the Court expressed no opinion that all such acts enjoy immunity. But it will be seen that the proposition contained in the words quoted above from the judgment in the *P. and O. S. N. Co.'s case*[45] is unqualified and categorical. In this connection, what Wallis, O. C. J. of Madras High Court stated about the *P. and O. S. N. Co.'s case*[46] in *Secretary of State* v. *Cockcraft*[47] may be quoted :

> "Though it only *decides* that the East India Company was liable for the negligent acts of its servants done in the course of

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[41] ('69) 5 Bom H C R (App) 1 (15, 16), *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[42] ('69) 5 Bom H C R (App) 1, *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[43] ('82) I L R 5 Mad 273 (279) (D B).

[44] ('69) 5 Bom H C R (App) 1, *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[45] ('69) 5 Bom H C R (App) 1 (15, 16), *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[46] ('69) 5 Bom H C R (App) 1, *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[47] **1915 Mad 993 (994) [AIR V 2] (D B).**

their employment, when such acts were done in the conduct by the Company of undertakings which might have been carried on by private individuals without any delegation of sovereign powers, yet, it is also *authority* for the position that in respect of acts done by the Company in the exercise of its sovereign powers, it could not have been made liable for the negligence of its servants in the course of their employment." (Italics ours.)

Again, in *Nobin Chunder Dey's case,*[48] Garth, C. J., characterised the *P. and O. S. N. Co.'s case*[49] as an authority "which explains and distinguishes in the clearest manner those claims which could, and *those which could not*, have been enforced against the East India Company before the Government of India Act of 1858." (Italics ours.)

Thus, so far as the *expression of opinion* is concerned, it would seem that there is no room for doubt that the dicta of Sir Barnes Peacock in the *P. and O. S. N. Co.'s case*[50] definitely lay down that in cases where the act in regard to which relief is asked has been done in the exercise of powers which can only be lawfully exercised by a Sovereign and not by a private individual, no suit will lie against the Government. Hence, as already stated, the question in controversy is how far the above dicta can be regarded as laying down sound law.

It has been pointed out by Mukherjea, J., in his judgment in the *Province of Bombay* v. *Khushaldas Advani,*[51] the above observations of Sir Barnes Peacock, C. J., in the *P. and O. S. N. Co.'s case*[52] deal with a question which was not before the Court for decision. Hence the observations may be treated as being merely in the nature of *obiter dicta*. But as already submitted, the trend of the observations shows that the proposition that no action will lie against the Government in regard to acts done in the exercise of "sovereign powers" was only the obverse of the proposition that an action would lie against the Government, in regard to acts done in the course of undertakings of the nature of private business, a proposition as to which there can be no doubt that it was clearly decided in the *P. and O. S. N. Company's case.*[53]

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[48] ('76) I L R 1 Cal 11 (25) (D B), *Nobin Chunder Dey* v. *Secretary of State.*

[49] ('69) 5 Bom H C R (App) 1 (15, 16), *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[50] ('69) 5 Bom H C R (App) 1, *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[51] 1950 S C 222 (249) (Pr 122) [AIR V 37 C 18] : 1950 S C R 621 (S C).

[52] ('69) 5 Bom H C R (App) 1, *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[53] ('69) 5 Bom H C R (App) 1, *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

(o) Whole question thrown open: Is the test of distinction between acts of private nature and those done in exercise of powers which only Sovereign can exercise correct?

Hence, it would appear that an examination of the question whether a suit against the Government would be barred in all cases in which the act to which the suit relates has been done in the exercise of powers that can be exercised only by a sovereign power and not by a private individual, throws open the entire question as to whether the test laid down by Sir Barnes Peacock in the *P. & O. S. N. Co.'s case*,[54] both in its positive and negative aspects, proceeds on sound lines. In other words, the validity of the entire proposition contained in the celebrated and oft-quoted passage in the judgment of Sir Barnes Peacock in the *P. & O. S. N. Co.'s case*[55] which enunciates the distinction between acts done in the exercise of what are usually termed sovereign powers and acts in the conduct of undertakings which might be carried on by private individuals, is thrown open for consideration by the challenge to the proposition in the latter part of the observations of Sir Barnes Peacock, namely, that an action will be barred in cases in which the act, to which the suit relates, has been done in the exercise of powers which can only be exercised by a Sovereign or his agents and not by private individual.

No doubt, it is an established proposition of law, beyond any shadow of doubt, that an act done in the course of an undertaking of a private character can be the basis of an action against the Government. But the question is whether the principle underlying this proposition, as stated by Sir Barnes Peacock, is correct. In other words, what is it that makes the suit against the Government competent in such cases? Is it the fact that it relates to an act done in the course of an undertaking of a private character as contrasted with an act done in the exercise of powers which only a Sovereign can exercise, or is there any *other* principle underlying the proposition? The line of decisions which may be said to be represented by the *Secretary of State for India in Council* v. *Hari Bhanji*[56] suggests that there is a different principle applicable to such cases, although the result arrived at may be the same. This principle is that a suit will lie against the Government in all cases in which the act to which the suit relates purports to have been done under colour of legal title or under municipal law, and does not amount to what is termed an Act of State in the strict sense, which is not governed by the municipal law at all.

(p) Test of distinction between acts of private nature and those of sovereign character not correct.

So viewing the problem and taking the observations of Sir Barnes Peacock in the *P. & O. S. N. Co.'s case*[57] as a whole, the test

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54. ('69) 5 Bom H C R (App) 1 (15, 16), *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

55. ('69) 5 Bom H C R (App) 1 (15, 16), *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

56. ('82) I L R 5 Mad 273 (D B).

57. ('69) 5 Bom H C R (App) 1 (15, 16), *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

of distinction, as laid down by him (between acts done in the course of undertakings of a private character and those done in the exercise of powers which only a Sovereign or his agent can exercise and not a private individual) though attractive, seems, with great respect, to be misleading and unsound in the light of principles laid down by well-known authorities of the Privy Council, according to which the only test for excluding from the cognizance of Courts claims against the Government is whether they relate to what is termed an "Act of State" in the strict sense, as contrasted with an act which is done under colour of municipal law.

(q) Cases discussed : *Secretary of State* v. *Kamachee Boye Sahaba.*

The first case that may be noted in this connection is *Secretary of State in Council of India* v. *Kamachee Boye Sahaba.*[58] In that case, on the death of the Raja of Tanjore, The East India Company seized the whole of his property as an escheat to the paramount power. On a bill filed by the eldest widow of the late Raja in the Supreme Court of Madras, the Court drew a distinction between the State or Crown property of the late Raja and his private and particular property and declared the plaintiff to be entitled to the latter. On appeal to the Privy Council by the Secretary of State in Council, it was contended by the appellant that the East India Company had seized the Raj of Tanjore and the whole of the property which was the subject of the suit, in the exercise of their sovereign power to deal with other sovereign States in India, and that over an act so done, whether rightfully or wrongfully, no municipal Court had any jurisdiction. This contention was accepted by the Privy Council, which held that the suit was not maintainable to any extent.

Lord Kingsdown observed in the course of his judgment :

> "The general principle of law was not, as indeed it could not, with any colour of reason be disputed. The transactions of independent States between each other are governed by other laws than those which municipal Courts administer; such Courts have neither the means of deciding what is right nor the power of enforcing any decision which they may make."

He then went on :

> "The next question is, what is the real character of the act done in this case ? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain, of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of municipal law ? or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Rajah of Tanjore, in trust for those who, by law, might be entitled

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[58] (1859) 7 Moo Ind App 476 (529, 531, 540) (P C).

to it on the death of the last possessor? If it were the latter, the defence set up, of course, has no foundation."

Then holding on the evidence that the seizure was not made under colour of any legal title but was made in the exercise of the arbitrary power of the Company acting as a sovereign power dealing with an independent State, the Privy Council held that the suit was entirely beyond the jurisdiction of the Court.

It will be seen that the ground on which it was held that the suit was not cognizable by a municipal Court, was *not* that the act of the Company, to which it related, was of such a nature as could be done only by a sovereign power and not by a private individual. The basis of the judgment was that the act was of a character which did not fall within the purview of municipal law, an act which Courts, charged with the administration of municipal law, could not appreciate and in respect of which no jurisdiction was committed to them.

Similarly, the judgment has specifically and expressly pointed out that if the act in question was done under colour of legal title, then the defence set up would have no foundation. It will be remembered that the defence set up was to the effect that the act complained of had been done by the Company in its capacity as a sovereign State empowered to deal with other sovereign States in India and hence not open to question in a Court of law. In other words, the Privy Council clearly expressed its opinion that if the act complained of was done under colour of legal title, the municipal Courts would not be debarred from questioning the act. It is worthy of note that the view of the Privy Council that the jurisdiction of the civil Court will not be excluded in the above case does not proceed on the ground that the act complained of is done in the course of an undertaking of a private nature, but on the ground that the act is done under colour of legal title.

In *Secretary of State* v. *Hari Bhanji*[59] the Madras High Court observed as follows :

> "The *Tanjore case*[60] is at the same time an authority for the position that where the act which is the ground of complaint is an act which professes to be done under the sanction of municipal law and in the exercise of powers conferred by that law, the circumstance that it is an act done by the sovereign power or by the deputy of that power does not oust the jurisdiction of the civil Courts. That the parties to the act then in question could claim

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[59] ('82) I L R 5 Mad 273 (281, 282) (D B).

[60] (1859) 7 Moo Ind App 476 (P C), *The Secretary of State* v. *Kamachee Boye Sahaba.*

such protection as was afforded by the *status* of sovereignty was not disputed, and the question on which the decision turned was, as will be seen from the passages we have quoted, whether the act affected to justify itself on grounds of municipal law or whether it was in whole or in part a possession taken by the Crown under colour of legal title, and in the latter case the Committee determined that the defence of absence of jurisdiction had no foundation."

Thus, it is clear that the test of distinction between acts in the nature of private business and acts done in the exercise of powers which only a Sovereign or his agent can exercise and not a private individual, laid down by Sir Barnes Peacock in the *P. & O. S. N. Company's case*,[61] is totally at variance with the test laid down by the Privy Council in *Kamachee Boye Sahaba's case*[62] for determining whether the jurisdiction of the Court is excluded in regard to a claim against the Government.

(r) ***Forester* v. *Secretary of State.***

Forester v. *Secretary of State*[63] is another important decision of the Privy Council, which shows that the test to determine, whether the jurisdiction of the Court over claims against Government is excluded or not, is whether the act complained of has been done under colour of legal title or constitutes an Act of State outside the purview of the municipal law. In that case, the plaintiff claimed title from one Begam Sumroo. At the time the East India Company acquired the *Doab* and territories on the west of the Jamuna, this lady held a jagir in the *Doab* on *jaidad* tenure, that is, subject to the obligation of maintaining a body of troops for the service of the Sovereign. Practically the whole administration of the territory included in the Jagir, whether civil or criminal, was vested in the Begam who exercised a sort of delegated sovereignty therein. On the death of the Begam, the East India Company resumed the jagir and seized the arms and military stores. The plaintiff sued to recover the estate and compensation for the seizure of arms, etc. It was pleaded that the Begam was an independent or quasi-independent Sovereign and the resumption and seizure were Acts of State of which the propriety and validity were not cognizable by any municipal Court. The Privy Council, having found that the Begam was not a sovereign princess, overruled the plea. Their Lordships, adverting to the *Tanjore case*,[64] observed :

"The act of Government in this case was not the seizure by arbitrary power of territories which up to that time had belonged to another sovereign State; it was the resumption of lands previously held from the Government under a particular tenure upon the alleged determination of that tenure. The possession was taken under colour of a legal title, that title being the undoubted right of the sovereign power to resume and retain or assess to the public revenue all lands within its territories upon the determination of the tenure under which they may have been exceptionally held rent-free. If by means of the continuance of that tenure or for other cause a right be claimed in derogation of the title of the Government, that claim like any other arising between the Government and its subjects would *prima facie* be cognizable by the municipal Courts of India."

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[61] ('69) 5 Bom H C R (App) 1 (15, 16), *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[62] (1859) 7 Moo Ind App 476 (P C), *Secretary of State* v. *Kamachee Boye Sahaba.*

[63] (1872) Ind App (Sup Vol) 10 (17, 18) (P C).

[64] (1859) 7 Moo Ind App 476 (P C), *Secretary of State* v. *Kamachee Boye Sahaba.*

Thus, the above case clearly proves that a suit against the Government would be cognizable by the municipal Courts although the act complained of is such that it can only be done by a ruling power and not by a private individual, provided the act is done under colour of legal title. As pointed out by the Madras High Court in *Secretary of State for India in Council* v. *Hari Bhanji*[65]:

> "The resumption of the jagir (in *Forester's case*[66]) was an act, which could under no circumstances have been legally done by a private person; it was an act of the Government, done in the exercise of administrative powers, but because it professed to be done under the sanction of municipal law, it was examinable by the municipal Courts."

(s) Other decisions.

The undermentioned authorities[67] proceed on the principle that the jurisdiction of municipal Courts is excluded in cases in which the claim relates to the dealings of one State with another State.

(t) Times of peace and war : Different principles applicable.

In times of peace, the acts of the sovereign power in relation to its own subjects will have always to justify themselves by recourse to the sanction of the municipal law and will not be beyond the scrutiny of the municipal Courts if they should be challenged by the persons affected. In *Eshugbayi Eleko* v. *Officer Administering Government of Nigeria*,[68] Lord Atkin observed as follows :

> "This phrase (Act of State) is capable of being misunderstood. As applied to an act of the sovereign power directed against another

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[65] ('82) I L R 5 Mad 273 (283) (D B).

[66] (1872) Ind App (Supp Vol) 10 (P C), *Forester* v. *Secretary of State*.

[67] (1793) 30 E R 521 (523) : 2 Ves Jun 56 (60), *Nabab of the Carnatic* v. *East India Company*. (Treaty between independent State and East India Company.)
1943 Bom 427 (429, 430) [AIR V 30] (D B), *Sarjerao* v. *Government of Bombay*. (Dispute relating to boundary between States.)
('05) I L R 32 Cal 1 (4) (P C), *Maharajah Madhava Singh* v. *Secretary of State for India in Council*. (Deposition of Native Ruler.)

[68] 1931 P C 248 (252) [AIR V 18] (P C).

sovereign power or the subjects of another sovereign power not owing temporary allegiance, in pursuance of sovereign rights of waging war or maintaining peace on the high seas or abroad, it may give rise to no legal remedy. But as applied to acts of the Executive directed to subjects within the territorial jurisdiction it has no special meaning, and can give no immunity from the jurisdiction of the Court to inquire into the legality of the act."

But in times of war or insurrection, the acts of the Government, even though they may affect its own citizens will come under the category of Act of State and will not be liable to be tested with reference to the municipal law, because in such cases the municipal law will cease to be applicable.[69] In *Secretary of State for India in Council* v. *Hari Bhanji*[70] the Madras High Court observed as follows:

> "Acts done by the Government in the exercise of the sovereign powers of making peace and war and of concluding treaties obviously do not fall within the province of municipal law, and although in the administration of domestic affairs the Government ordinarily exercises powers which are regulated by that law, yet there are cases in which the supreme necessity of providing for the public safety compels the Government to acts which do not pretend to justify themselves by any canon of municipal law. For the exercise of these powers the Government, though irresponsible to the Courts, is not wholly without responsibility. Under the Constitution of England, it is more or less responsible to Parliament through the responsible ministers of the Crown.
>
> "Acts thus done in the exercise of sovereign powers but which do not profess to be justified by municipal law are what we understand to be the acts of state of which municipal Courts are not authorized to take cognizance."

(See also ART. 34 NOTE 2 and ART. 226 NOTE 86.)

But the Government cannot avoid liability for its acts affecting its own subjects by merely alleging the existence of a State of war or insurrection as a justification. The allegation will have to be proved as a question of fact before immunity is claimed. In *Union of India* v. *Ram Kamal*[71] Ram Labhaya, Acting C. J., observed :

> "Acts in the exercise of sovereign power of the State in times of war, insurrection, rebellion and other emergency of a like character

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[69] 1953 Assam 116 (124, 125, 126) (Prs 54, 55, 56, 57, 58, 59, 60, 61) [AIR V 40 C 53] (D B), *Union of India* v. *Ram Kamal*.

1934 Bom 277 (294) [AIR V 21], *Municipal Corporation of Bombay* v. *Secretary of State*.

('82) I L R 5 Mad 273 (279) (D B), *Secretary of State* v. *Hari Bhanji*.

[70] ('82) I L R 5 Mad 273 (279) (D B).

[71] 1953 Assam 116 (124) (Pr 50) [AIR V 40 C 53] (D B).

affecting the person or the property of the subjects which in England are described as acts in the exercise of prerogative but which in India have been regarded as covered by the expression 'Act of State' should also enjoy immunity. But immunity in regard to these acts cannot in the nature of things be larger than that enjoyed by the Crown in England as the Government of India had only delegated sovereignty under the Act of 1935. The extent of this immunity has not been judicially determined either in England or in India. There is considerable divergence of opinion amonst constitutional thinkers in England. As observed by Pollock in his treatise on TORTS (p. 37) 'the better view seems to be that in the absence of an Act of Indemnity the existence of the necessity and the reasonableness of the action should be determined by ordinary Courts when peace is restored.' The Courts, therefore, may not decline jurisdiction in regard to such acts merely because privilege or immunity is claimed. The State should satisfy the Court as to the necessity and the reasonableness of the action before it could command recognition of its claim to immunity."

(u) Correctness of view submitted, examined.

It has been submitted above that the test of distinction laid down by Sir Barnes Peacock in *P. & O. S. N. Co.'s case*[72] between acts of the Government done in the conduct of undertakings which might be carried on by private individuals and those done in the exercise of powers which cannot be lawfully exercised except by a Sovereign or its delegates, is at variance with well established principles as laid down by the Judicial Committee and hence cannot be accepted as a sound test of distinction for the purpose of determining in what cases the jurisdiction of the Courts would be excluded in regard to claims against the Government. The correctness of the view submitted may now be examined.

(v) *Moment's case* explained.

In this connection it is necessary to notice the judgment of the Privy Council in *Secretary of State for India* v. *Moment*[73] in which Lord Haldane expressed his approval of the reasoning of Sir Barnes Peacock, C. J., in *P. & O. S. N. Co.'s case.*[74] The question is as to the exact import of the observations of Lord Haldane in *Moment's case.*[75] Do the observations amount to an approval of the distinction between sovereign and non-sovereign acts made by Sir Barnes Peacock for the purpose of determining whether a suit would lie against the Government in a given case?

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[72] ('69) 5 Bom H C R (App) 1 (15, 16), *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State.*

[73] ('13) I L R 40 Cal 391 (399) (P C).

[74] ('69) 5 Bom H C R (App) 1, *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[75] ('13) ILR 40 Cal 391 (PC), *Secretary of State for India* v. *Moment.*

The facts in *Moment's case*[76] were these. The Government instituted a suit for eviction of a certain person from what was claimed to be Government land. The suit was decreed in the lower court, but dismissed by the appellate Court as being barred under S. 41 (b) of the Burma Town and Village Lands Act, 1898. In the meanwhile, the Government had taken proceedings in execution of the decree of the lower Court and the judgment-debtor was dispossessed in consequence and further, his buildings on the land were also dismantled in part. After the suit of the Government was dismissed in appeal and the property was restored to the judgment-debtor, the judgment-debtor brought a suit against the Government for damages and compensation.

It was contended in defence by the Government that the suit was barred by S. 41 (b) of the Burma Act of 1898, which provided that no civil Court shall have jurisdiction to determine any claim to any right over land as against the Government. This contention was met by the plaintiff by the plea that the above section was *ultra vires* as being in contravention of S. 65 of the Government of India Act 1858, which provided that there was to be the same remedy for the subject against the Government as there would have been against the East India Company.

In dealing with the question Lord Haldane, delivering the judgment of the Privy Council, observed as follows:

> "Their Lordships are satisfied that a suit of this character would have lain against the Company. The reasons for so holding are fully explained in the judgment of Sir Barnes Peacock, C. J., in *Peninsular & Oriental Steam Navigation Co.* v. *The Secretary of State for India*,[77] and the only question is whether it was competent for the Government of India to take away the existing right to sue in a civil Court."

The question is whether, from the above observations, it can be said that the Privy Council in *Moment's case*[78] approved of the entirety of the reasons given by Sir Barnes Peacock, C. J., in the *P. & O. S. N. Co.'s case*,[79] including that part of them which drew a distinction between acts of the Government done in the course of undertakings of a nature which could be lawfully carried on by a private individual as well, and acts done in the exercise of powers which could only be exercised by a sovereign body or its delegates. Can it be said that the Privy Council endorsed the view that a suit against the East India Company would have lain only in the former type of cases and not in the latter type ?

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[76] ('13) ILR 40 Cal 391 (399) (PC), *Secretary of State for India* v. *Moment.*

[77] ('69) 5 Bom H C R (App) 1.

[78] ('13) ILR 40 Cal 391 (PC), *Secretary of State for India* v. *Moment.*

[79] ('69) 5 Bom H C R (App) 1, *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

In order to appreciate the nature of the question which their Lordships were considering, it will be useful to quote the following sentence with which the judgment opens : "This appeal raises the question whether the Government of India could make a law, the effect of which was to debar a civil Court from entertaining a claim against the Government to any right over land."

In the light of this sentence, it would seem that their Lordships only held *broadly*, that a suit involving a claim over land would have lain against the East India Company. Their Lordships do not seem to have been referring even remotely to the nature of the acts of Government or its agents giving rise to the suit. In other words, their Lordships do not seem to have been referring at all to the question whether the acts were done in the conduct of an undertaking of a private character or in the exercise of powers of a sovereign nature.

But it may be questioned whether the reference to the 'reasons' of Sir Barnes Peacock, C. J., in the *P. & O. S. N. Company's case*[80] does not imply an approval of the test of distinction between sovereign and non-sovereign acts laid down by Sir Barnes Peacock. It is submitted that the approval, in general terms, of the reasoning given by Sir Barnes Peacock, C. J., in his long judgment in the *P. & O. S. N. Co.'s case*[81] cannot be taken as an endorsement of each and every statement made by Sir Barnes Peacock in the course of his judgment. To hold that the Privy Council in *Moment's case*[82] adopted, as the basis of its decision, that part of the judgment of Sir Barnes Peacock, C. J., in which he laid down his test of distinction between sovereign and non-sovereign acts, would lead to a position which it is not likely at all that their Lordships would have approved. For, the logical implication of this view would be that a suit against the Government involving a claim over land must in each and every case necessarily originate in an act of the Government or its agents done in the course of a transaction of the character of private business. Such a proposition would obviously be too broad and a sweeping one as cases can very easily be conceived of in which the acts giving rise to such a suit against the Government are done in the exercise of indubitably sovereign powers. For instance, when Government seeks to take forcible possession of plaintiff's land in the exercise of its powers of compulsory acquisition or requisitioning of property and the plaintiff seeks redress in a court of law, as in the case of *Province of Bombay* v. *Khushaldas Advani*,[83] the plaintiff's suit would be one involving a claim of a right over land and yet, the act giving rise to the suit would obviously be one done in the exercise of a power which can only be exercised by a Sovereign or his delegates.

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[80] ('69) 5 Bom H C R (App) 1, *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[81] ('69) 5 Bom H C R (App) 1, *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[82] ('13) ILR 40 Cal 391 (PC), *Secretary of State for India* v. *Moment.*

In the *P. & O. S. N. Company's case*,[84] the question for consideration was stated to be as follows :

> "Whether the Secretary of State was liable for the damages occasioned by the negligence of servants in the service of Government, assuming them to have been guilty of such negligence as would have rendered an ordinary employer liable."

The main argument on behalf of the Secretary of State was that the East India Company having been invested with sovereign powers was entitled to the privileges and immunities of the Sovereign and that such a suit would, therefore, not have lain against the East India Company and hence would not lie against the Secretary of State. This contention was repelled and it was held that the East India Company, though invested with sovereign powers, was not Sovereign and was not entitled to the immunities of the Sovereign. It was therefore held that such a suit would lie against the East India Company. It is conceived that it is this part of the reasoning in the *P. & O. S. N. Company's case*[85] that must have been in the contemplation of their Lordships of the Privy Council in *Moment's case*.[86]

Moreover, in *Moment's case*,[87] their Lordships have only held that a suit involving a claim for land would have lain against the East India Company, and they have not expressed any opinion as to what kinds of suits would *not* have lain against the East India Company. Hence, it seems to be extremely doubtful whether their Lordships meant to endorse the views of Sir Barnes Peacock, C. J., as to the type of cases in which a suit would *not* have lain against the East India Company. Even in the *P. & O. S. N. Company's case*,[88] the observations of Sir Barnes Peacock, C. J., as to the type of cases in which the suit would not have lain against the East India Company were merely *obiter dicta.* But in *Moment's case*[89] there are not even *obiter dicta* of the Privy Council to indicate their views on this aspect of the question. Under the circumstances, it seems it would be going too far to infer from their adoption of the reasons of Sir Barnes Peacock, C. J., for holding that a certain type of suits would have lain against the East India Company, the conclusion that their Lordships also endorsed all that he had said about the type of cases in which *no* action would have lain against the East India Company.

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[83] 1950 S C 222 [AIR V 37 C 18] : 1950 S C R 621 (SC).

[84] ('69) 5 Bom H C R (App) 1 (3), *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[85] ('69) 5 Bom H C R (App) 1 (10), *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[86] ('13) ILR 40 Cal 391 (PC), *Secretary of State for India* v. *Moment.*

[87] ('13) ILR 40 Cal 391 (399) (PC), *Secretary of State for India* v. *Moment.*

[88] ('69) 5 Bom H C R (App) 1 (15, 16), *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

On the whole, therefore, it is difficult to regard the observations of the Privy Council as a strong authority in support of the theory propounded by Sir Barnes Peacock, C. J., making a distinction between sovereign and non-sovereign activities of the Government for the purpose of determining in what cases a suit would lie against the Government, and in what cases such a suit would not lie.

At any rate, in view of the very clear pronouncement of the Privy Council in *Secretary of State in Council of India* v. *Kamachee Boye Sahaba*[90] and *Forester* v. *Secretary of State,*[91] the cryptic statement of the Privy Council in *Moment's case*[92] implying approval of the reasoning of Sir Barnes Peacock, C. J., in the *P. & O. S. N. Company's case*[93] cannot be regarded as affecting the authority of those weighty pronouncements.

Moreover, there is a sentence in the *Secretary of State for India* v. *Moment*[94] which clearly indicates that in the view of their Lordships, the subject has the right to sue the Government in the same way as he can sue any other defendant. The sentence in question runs as follows:

> "It may well be that the Indian Government can legislate validly about the formalities of procedure so long as they preserve the *substantial right of the subject to sue the Government in the civil Courts like any other defendant* and do not violate the fundamental principle that the Secretary of State, even as representing the Crown, is to be in no position different from that of the old East India Company." *(Italics ours)*

It is submitted that the phraseology of the above sentence only marches with an interpretation of their Lordships' judgment which accords a right of suit against the Government in *all* cases in which such a suit would have lain against a private person, including those in which the act to which the suit relates is one done in the exercise of what are usually called sovereign powers.

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[89] ('13) ILR 40 Cal 391 (PC), *Secretary of State for India* v. *Moment.*

[90] (1859) 7 Moo Ind App 476 (529, 531) (PC).

[91] 72 Ind App (Supp Vol) 10 (17, 18) (PC).

[92] ('13) ILR 40 Cal 391 (399) (PC), *Secretary of State* v. *Moment.*

[93] ('69) 5 Bom H C R (App) 1, *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[94] ('13) ILR 40 Cal 391 (401) (PC).

It must, however, be pointed out that in *Secretary of State for India* v. *Moment*[95] the dispute originated in a claim of title to land asserted by the Government as against the plaintiff who was in possession of the land. The nature of the dispute was described by Lord Haldane as follows :

> "The proceedings out of which the appeal arises related to an ordinary dispute about the title to land in the course of which there emerged a claim to damages for wrongful interference with plaintiff's property."

It is quite possible to argue from the above that on the facts of the particular case the dispute between the Government and the plaintiff was in the nature of an ordinary dispute between two private parties and that the acts of the Government which gave rise to the suit were similar to the acts of any private person claiming title to land in another's possession. It may, therefore, be argued that *Moment's case*[96] falls within the principle laid down by Sir Barnes Peacock, C. J., in the *P. & O. S. N. Company's case*[97] namely, that a suit will lie against the Government when the acts giving rise to the suit have been done in the conduct of undertakings which may be lawfully carried on by a private individual, and not otherwise.

As against this line of argument, it must be noted that, as already pointed out, the Privy Council does not seem to have been contemplating any particular category of suits involving claims to land when it held that such suits would have lain against the East India Company. The Privy Council has simply held broadly that suits involving claims over land would have lain against the East India Company and such suits, as already pointed out, may originate in acts of a private nature as well as in acts of a sovereign character.

Moreover, even on the facts in the *Moment's case*[98] the dispute related to what was claimed to be *State* land, from which the Government claimed the right to evict the plaintiff under the provisions of Burma Towns and Village Lands Act, 1898, on payment of compensation to him for his buildings. Obviously the powers which the Government claimed to exercise were the powers which only the Government could exercise.

Hence, it cannot be stated definitely that only one view was possible as to the nature of the acts which led to the suit against

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95. ('13) ILR 40 Cal 391 (398) (PC).

96. ('13) ILR 40 Cal 391 (PC), *Secretary of State* v. *Moment.*

97. ('69) 5 Bom HCR (App) 1 (15, 16), *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

98. ('13) ILR 40 Cal 391 (398) (PC), *Secretary of State* v. *Moment.*

the Government in *Moment's case.*[99] Hence, on the whole, the observations of the Privy Council in *Moment's case*[100] are an extremely doubtful authority on which reliance can be placed in support of the theory as to the distinction between sovereign and non-sovereign acts propounded by Sir Barnes Peacock, C. J., in *P. & O. S. N. Company's case.*[101]

(w) Observations of Privy Council in: *Venkata Rao* v. *Secretary of State.*

On the other hand, the observations of the Privy Council in *Venkata Rao* v. *Secretary of State*[102] are strongly suggestive of the view that a principle excluding from the cognizance of Courts suits against the Government in cases in which the act complained of pertains to the sovereign capacity of the Government, is not acceptable to their Lordships. In that case, the Madras High Court,[103] following *Secretary of State* v. *Cockcraft,*[104] had expressed the view that the East India Company could only have been sued in its capacity of a trading corporation and that it could not have been sued for Acts of State or *Sovereignty* and although a dismissal of a servant of the Crown may not perhaps, strictly speaking, be described as an act of State, it can certainly be more properly put in the class of acts of sovereignty rather than in the class of cases embraced by transactions carried on by private individuals and trading corporations, as the control of departments of State must be in the exercise of certain sovereign rights. The Madras High Court had also held, on this reasoning, that under S. 32 of the Government of India Act, 1919, a suit for wrongful dismissal would not lie against the Secretary of State for India at the instance of a servant of the Crown, who has been dismissed from service.

The above view of the Madras High Court was dissented from by the Privy Council on appeal in *Venkata Rao* v. *Secretary of State.*[105] The Privy Council observed as follows :

> "The reasoning of the Courts below as to S. 32 of the India Act, 1919, and its effect and bearing on these actions is another matter to which their Lordships must not be taken to give their assent. As at present advised their Lordships are not disposed to think that this section, which is a section relating to parties and procedure, has an effect to limit or bar the right of action of a person entitled to a right against the Government, which would

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[99] ('13) ILR 40 Cal 391 (PC), *Secretary of State* v. *Moment.*

[100] ('13) ILR 40 Cal 391 (399) (PC), *Secretary of State* v. *Moment.*

[101] ('69) 5 Bom HCR (App) 1 (15, 16), *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[102] 1937 P C 31 (35) [AIR V 24] (PC).

[103] 1934 Mad 516 (522) [AIR V 21] (DB), *R. T. Rangachari* v. *Secretary of State.*

[104] 1915 Mad 993 [AIR V 2] (DB).

[105] 1937 P C 31 (35) [AIR V 24] (PC).

otherwise be enforceable by action against it, merely because an identical right of action did not exist at the date when the East India Company was the body, if any, to be sued. If it had appeared that the plaintiff's service under the Act of 1919 was not terminable at pleasure their Lordships are not prepared to say that remedy by suit against the Secretary of State in Council for a breach of the contract of service would not have been available to the plaintiff. Breach of contract by the Crown can in England be raised by petition of right. The fact that for a different reason—namely, that service under the East India Company was at pleasure—a precisely similar suit could not have been brought against the Company does not in their Lordships' view conclude the matter either under cl. (2), Section 32 of the Act or on the reasoning of Sir Barnes Peacock in *P. & O. S. N. Company's case.*[106]"

No doubt, the above observations of the Privy Council proceed on the ground that a suit against the Secretary of State would not be excluded merely because an identical right of suit did not exist at the date when the East India Company was the body, if any, to be sued.[107] But their Lordships' observations necessarily negative the principle of excluding a suit in *every* case in which it relates to an act of the Government pertaining to its sovereign capacity. Their Lordships have clearly held that a suit based on *contract* would *lie* against the Government even though the contract may relate to a matter pertaining to the governmental and not commercial functions of the Government. Such a view is directly contrary to the observations of Sir Barnes Peacock in the *P. & O. S. N. Company's case.*[108]

(x) *Rogers* v. *Rajendro Dutt* examined

Before proceeding further, reference has also to be made to the judgment of the Privy Council in *Thomas Eales Rogers* v. *Rajendro Dutt.*[109] In that judgment, the following sentence occurs :

> "The civil irresponsibility of the supreme power for tortious acts could not be maintained with any show of justice, if its agents were not personally responsible for them."

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[106] ('69) 5 Bom H C R (App) 1, *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[107] 1937 Rang 89 (96, 97) [AIR V 24] (SB), *Secretary of State* v. *Maurice.* (It is the character of the suit and not whether it would have succeeded against the East India Company that is the test. If it is of that character that would have been against the East India Company, then by statute it lies against the Secretary of State for India in Council. Therefore, it is wrong to argue that because under the relevant statutes applicable to employment under the East India Company no suit brought under the parallel circumstances against it could have succeeded, no suit lies against the Secretary of State.)

[108] ('69) 5 Bom H C R (App) 1 (15, 16), *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[109] (1861) 8 Moo Ind App 108 (131) (PC).

The above sentence, no doubt, implies the civil irresponsibility of Government for the tortious acts of its servants. On the basis of this sentence it was held by the Bombay High Court in *Shiva Bhajan Durgaprasad* v. *Secretary of State for India*,[110] that a suit for damages for tort would not lie against the Government in respect of acts or defaults of its servants. The authority of *Thomas Eales Rogers* v. *Rajendro Dutt*[111] must, however, be held as practically superseded by the judgment of the Privy Council in *Moment's case*[112] approving of the judgment of Sir Barnes Peacock, C. J., in *P. & O. S. N. Company's case.*[113] It may be pointed out that in *Thomas Eales Rogers* v. *Rajendro Dutt*,[114] the acts involved were clearly such that, according to the test laid down by Sir Barnes Peacock, C. J., would have fallen within the category of acts done in the course of conduct of undertakings of the nature of private business. Hence, if the suit had been brought against the East India Company, such a suit would have lain even according to the narrower view in the judgment of Sir Barnes Peacock, C. J., in *P. & O. S. N. Company's case*[115] which judgment has been approved of by the Privy Council in *Moment's case.*[116]

To the extent to which the judgment of the Bombay High Court in *Shiva Bhajan* v. *Secretary of State*[117] is based on *Thomas Eales Rogers* v. *Rajendro Dutt*,[118] the judgment of the Bombay High Court must also be treated as no longer good law in view of the judgment of the Privy Council in *Moment's case.*[119]

(y) Observations of Privy Council in *High Commissioner for India* v. *I.M. Lall*, examined.

In *High Commissioner for India* v. *I. M. Lall*,[120] the Privy Council observed as follows:

> "It is unnecessary to cite authority to establish that no action in tort can lie against the Crown, and, therefore, any right of action must either be based on contract or conferred by statute."

As regards the above observations it must first be noted that they concede the right of suit against the Government when the suit is based on *contract*. To that extent they weaken the authority of the observations of Sir Barnes Peacock, C. J., in the *P. & O. S. N. Company's case*,[121] according to which even *contracts* made by the Government while acting in the exercise of what are usually called sovereign powers, could not be made the basis of the suit against Government. It may be remembered that in *Nobin Chunder Dey's case*,[122] the Calcutta High Court held that a suit based on *contract* would not lie against the Government where it arose out of transactions which only a sovereign body could lawfully engage in. Hence, the general proposition that a suit would not lie against the Government in respect of acts done in the sovereign capacity is negatived by the above observations of the Privy Council as also those in *Venkata Rao* v. *Secretary of State*[123] already discussed.

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[110] ('04) ILR 28 Bom 314 (323, 324) (DB).

[111] (1861) 8 Moo Ind App 108 (PC).

[112] ('13) ILR 40 Cal 391 (PC), *Secretary of State for India* v. *Moment.*

[113] ('69) 5 Bom H C R (App) 1, *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[114] (1861) 8 Moo Ind App 108 (PC).

[115] ('69) 5 Bom H C R (App) 1, *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[116] ('13) ILR 40 Cal 391 (399) (PC), *Secretary of State for India* v. *Moment.*

[117] ('04) ILR 28 Bom 314 (323, 324) (DB).

[118] (1861) 8 Moo Ind App 108 (PC).

[119] ('13) ILR 40 Cal 391 (PC) *Secretary of State for India* v. *Moment*

[120] 1948 P C 121 (127) (Pr 24) [AIR V 35 C 35]: 75 Ind App 225 : 1948 F C R 44 (PC).

As regards a suit based on tort the observations are general and it is extremely improbable that their Lordships would have intended to deny the right of suit in such cases even to the extent conceded by Sir Barnes Peacock, C. J., in *P. & O. S. N. Co.'s case*,[124] where he held that such suit would clearly lie in cases in which the act complained of had been done in the course of undertakings of the nature of a private business. It must be remembered that there is no doubt that this aspect of the judgment of Sir Barnes Peacock, C. J., has been approved by the Privy Council in *Moment's case*.[125] It is extremely improbable that the Privy Council in *I. M. Lall's case*[126] would have intended to supersede the view expressed by itself in *Moment's case*.[127] Thus, the exact import of the observations of the Privy Council in *I. M. Lall's case*,[128] is far from clear. Moreover, the observations were in the nature of *obiter dicta*. Hence, it is doubtful whether the observations of the Privy Council in *I. M. Lall's case*[129] would supersede the earlier decisions of the Privy Council in *Secretary of State* v. *Kamachee Boye Sahaba*[130] and *Forester* v. *Secretary of State for India in Council*.[131]

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[121] ('69) 5 Bom H C R (App) 1 (15, 16), *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India*.

[122] ('76) ILR 1 Cal 11 (26, 27) (DB), *Nobin Chunder Dey* v. *Secretary of State*.

[123] 1937 P C 31 (35) [AIR V 24] (PC), *Venkata Rao* v. *Secretary of State*.

[124] ('69) 5 Bom H C R (App) 1, *Peninsular and Oriental Steam Navigation Co* v. *Secretary of State*.

[125] ('13) ILR 40 Cal 391 (399) (PC), *Secretary of State for India* v *Moment*.

[126] 1948 P C 121 [AIR V 35 C 35] : 75 Ind App 225 : 1948 F C R 44 (PC), *High Commissioner for India* v. *I. M. Lall*.

[127] ('13) ILR 40 Cal 391 (399) (PC), *Secretary of State for India* v. *Moment*.

[128] 1948 P C 121 (127) (Pr 24) [AIR V 35 C 35] : 75 Ind App 225 : 1948 F C R 44 (PC) *High Commissioner for India* v. *I. M. Lall*.

[129] 1948 P C 121 (127) [AIR V 35 C 35] : 75 Ind App 225 : 1948 F C R 44 (PC), *High Commissioner for India* v. *I. M. Lall*.

[130] (1859) 7 Moo Ind App 476 (PC).

[131] ('72) Ind App Supp Vol 10 (PC).

(z) *State of Bihar* v. *Abdul Majid.*

The next case to which reference has to be made is *State of Bihar* v. *Abdul Majid.*[132] In that case, the Supreme Court observed as follows :

> "As regards torts of its servants in exercise of sovereign powers the Company (The East India Company) was not, and the Crown in India was not, liable unless the act had been ordered or ratified by it. Be that as it may, that rule has no application to the case of arrears of salary earned by a public servant for the period that he was actually in office. The present claim is not based on tort but is based on *quantum meruit* or contract and the Court is entitled to give relief to him."

It will be seen that the above observations also do not wholly support the theory of distinction between sovereign and non-sovereign acts as the basis of determination of the question whether a suit against the Government will be cognizable by civil Court. The observations seem to recognize the validity of the theory only as regards suits on *torts.* As regards suits based on *quantum meruit* or contract, the Supreme Court has definitely held that such suit would lie against the Government irrespective of the question whether it relates to the exercise of sovereign functions or commercial functions by the Government. The view expressed by Sir Barnes Peacock, C. J., in *P. & O. S. N. Co.'s case,*[133] which was followed by the Calcutta High Court in *Nobin Chunder Dey's case,*[134] that no action would lie against the Government even where it is based on *contract,* if the contract has been entered into by the Government in the exercise of what are usually called sovereign powers, must, therefore, be regarded as clearly *overruled* by the Supreme Court in the above case.[135]

As regards suit based on tort, however, the observations of the Supreme Court do seem to recognize a difference between acts done in the exercise of sovereign powers and other acts. But the observations in this regard are clearly *obiter dicta* and the expression "Be that as it may" indicates that the Supreme Court was only expressing its opinion in a tentative fashion.

(za) ***Moodalay*** **v.** ***Morton.***

The judgment of the Master of the Rolls (afterwards Lord Kenyon) in *Moodalay* v. *Marton,*[136] which Sir Barnes Peacock has cited, contains the following words :

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[132] 1954 S C 245 (249, 250) (Pr 17) [AIR V 41 C 54] : 1954 S C R 786 (SC).

[133] ('69) 5 Bom H C R (App) 1 (15, 16), *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[134] ('76) ILR 1 Cal 11 (26, 27) (DB), *Nobin Chunder Dey* v. *Secretary of State.*

[135] It has already been seen above that the view is contrary to the observations of the Privy Council in *Venkata Rao* v. *Secy. of State.* (A I R 1937 P C 31 (35) and *High Commissioner for India* v. *I. M. Lall.* (AIR 1948 P C 121 (127).)

[136] (1785) 28 E R 1245 (1246) : 1 Bro C C 469.

"I admit that no suit will lie in this Court against a sovereign power, for anything done in that capacity; but I do not think the East India Company is within that rule. They have rights as a sovereign power, they have also duties as individuals; if they enter into bonds in India, the sums secured may be recovered here. So, in this case, as a private company, they have entered into a private contract to which they must be liable. . . . Here is a *prima facie* ground of action."

But it will be seen that the observations of the Master of the Rolls excluding the right of action in the case of acts done in a sovereign capacity, are only in the nature of *obiter dicta.* Whatever criticism is applicable to the observations of Sir Barnes Peacock in this respect is also applicable to the observations of the Master of the Rolls and the distinction drawn by the Master of the Rolls has, therefore, to be regarded not only as not proceeding on sound lines but also as not being of much validity at the present day.

(zb) Resulting position on the authorities — Suits ex contractu.

From the above review of authorities, it is clear that the test of distinction between sovereign and non-sovereign acts as the basis for determining the jurisdiction of Courts in suits against Government, has no validity at the present day in the broad and comprehensive form in which it was enunciated by Sir Barnes Peacock, C. J., in *P. & O. S. N. Company's case*[137] and that as regards suits on *contracts*, at least, the distinction has no application.

(zc) Suits based on tort.

Even as regards suits on *torts*, although the generality of the decisions proceeds on the view that no suit will lie against the Government in respect of tortious acts of its servants,[138] yet, they recognize that the rule is subject to exceptions. The exceptions usually recognized are where the acts have been ordered or ratified by the Government, or where the suit is for relief on the allegation of detention of land, chattel or money or where the Government has profited by the acts of the public officer or where the suit is for damages for trespass to plaintiff's property.[139] The principle on which

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[137] ('69) 5 Bom H C R (App) 1 (15, 16), *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[138] 1954 S C 245 (250) [AIR V 41 C 54] : 1954 S C R 786 (SC), *State of Bihar* v. *Abdul Majid.* (Rule that suit on tort will not lie in regard to acts done in exercise of sovereign powers *except when it was ordered or ratified* does not apply to *quantum meruit* or contract.)

1954 F C 41 (44) [AIR V 31] (FC), *Gurucharan Kaur* v. *Province of Madras.* (Confirming on appeal AIR 1942 Mad 539.)

1954 Pat 513 (517, 513) [AIR V 41 C 174] : ILR 33 Pat 603 : 1954 Cri L Jour 1593 (DB), *State of Bihar* v. *Sonabati Kumari.* (The authorities cited establish that by now the general immunity of the State in India in the field of torts has been put to at least three broad exceptions and in those cases the State is liable to an action in Courts for the tortious liabilities of its servants—The three broad exceptions are : (i) Where the act is done in the conduct of undertakings which might be carried on without having sovereign power delegated to it : 5 Bom H C R App 1 at pp. 13 and 16 approved in 40 I A 48; (ii) Where the acts consist in detention by State of lands, goods, chattels or money though in fact those acts are done in exercise of powers usually called sovereign or governmental powers or powers given to them under municipal law; (iii) Act authorised by the State or where the State has been profited by it.

1953 Assam 116 (Pr 55) [AIR V 40 C 53] (DB), *Union of India* v. *Ram Kamal.* (Using "Act of State" in broader sense, the following conclusions may be deduced : (i) Acts falling within "foreign sphere" not justiciable ; (ii) Acts in exercise of sovereign power in times of war, insurrection, rebellion and other emergencies of like character not justiciable. In other cases the acts of officers or servants of Government for which action would lie against the Government are : (1) Acts professedly done under sanction of municipal law in exercise of powers conferred by that law. Similarly, acts for which there is an enforceable statutory obligation ; (2) Acts of detention by Government or its officials of lands, goods, including acts of trespass ; (3) Acts expressly authorised by Government or where Government has profited by their performance.)

('47) ILR (1947) 2 Cal 141 (146, 147, 149), *Uday Chand Mahatab* v. *Province of Bengal.* (Patni sale—Collector paying sale proceeds to wrong person — *Held* Crown not liable for negligence of Collector : (1876) ILR 1 Cal 11, Foll. — In this case, it was held that to the rule that no suit would lie for acts done in exercise of sovereign powers, (though under colour of municipal law), there were certain exceptions and that a suit would lie for detention of land or chattels but not in other cases of acts done by officers except where the act had been expressly authorised or Crown had profited by it.)

1934 Bom 277 (293, 294) [AIR V 21], *Municipal Corporation Bombay* v. *Secretary of State.* (It would be a misnomer to call ordinary administrative acts of Sovereign against its own subjects in peace time acts of State and claim immunity although they amount to a contract between sovereign and subject — Further held that apart from commercial transactions, there are only three exceptions in which Secretary of State could be made liable : (1) trespass to immovable property; (2) obligation imposed by statute, and (3) when it can be shown that benefit has resulted to Government from a tort of its servants.)

1931 Rang 294 (300) [AIR V 18] (DB), *Kader Zailany* v. *Secretary of State.* (Wrongful arrest and detention by police — No suit will lie against Secretary of State for damages. Suits may be brought against Government in respect of acts of officers of Government employed in the collection of revenue and in the financial or commercial concerns of the public, and it is possible that in certain circumstances Government may be liable for torts committed by such officers. But police officers are not such officers and the general rule seems to be that Government is not liable for wrongs done by its officers unless the wrongful act is done either by its order or on its behalf being subsequently ratified or adopted by it and is not ordinarily liable for wrongs done by subordinate public officers in exercise of powers given to them by law—In present case, alleged wrong was done by police officers in exercise of powers given by law, and if their action is maliciously wrongful as applicant alleges he had his remedy against them by way of suit subject to the conditions laid down in S. 42, Police Act and S. 80, Civil P. C., but he had no remedy against Secretary of State as representing the Government.)

1915 Mad 993 (994) [AIR V 2] (DB), *Secy. of State* v. *Cockeraft.*

1915 Mad 434 (439) [AIR V 2], *Ross* v. *Secretary of State.*

[139] See the cases in *Foot Note* (138) *above.*

such exceptions are based has not been clearly discussed in any of the authorities. Apparently, they are based on the ground that in such cases a Petition of Right would have lain against the Crown in England.[140] The recognition of such exceptions clearly amounts to holding that the broad proposition laid down by Sir Barnes Peacock, C. J., in *P. & O. S. N. Co.'s case*[141] that no action will lie against the Government in respect of acts done in its sovereign capacity, is not a satisfactory rule of guidance in determining in what cases a suit will lie against the Government. If the above principle is not a satisfactory one, and if the Government is not to be immune from the liability to be sued in a Court of law merely on the ground that the act complained of has been done in its sovereign capacity, then it is not clear why the liability of the Government must be confined to cases in which a Petition of Right would have lain against the Crown in England.

(zd) Difficulty of defining acts done in exercise of powers which only Sovereign or his agents can exercise.

Moreover, what amounts to exercise of powers usually called sovereign powers, or powers which can be lawfully exercised only by a sovereign body or its agents and not by a private individual, can hardly be stated with any degree of definiteness. In this connection, the observations of Sir Barnes Peacock, C. J., himself in *P. & O. S. N. Company's case*[142] may be quoted. He said:

> "It may be difficult in some cases to determine whether an act is done in the exercise of powers usually called sovereign powers by individuals to whom such powers have been lawfully delegated. It is clear that the East India Company would not have been liable for any act done by any of its officers or soldiers in carrying on hostilities, or for the act of any of its naval officers in seizing as prize property of a subject, under the supposition that it was the property of an enemy, nor for any act done by a military or naval officer or by any soldier or sailor, whilst engaged in military or naval duty, nor for any acts of any of its officers or servants in the exercise of judicial functions. . . . . . But we think there can be no doubt that the East India Company would have been liable for the negligence of its servants or officers in navigating a river steamer or in repairing the same or in doing any act preparatory to such repairs. Such an act could not by any possibility be said to be done in the exercise of sovereign powers although it was an act which

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[140] *See* 1915 Mad 434 (438) [AIR V 2], *Ross* v. *Secy. of State.* (The liabilities of East India Company cannot have been any less than those of the Crown in England on a Petition of Right which extend not only to detention of land, chattels or money of the subject but also to breach of contract.)

[141] ('69) 5 Bom H C R (App) 1 (15, 16), *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[142] ('69) 5 Bom H C R (App) 1 (16, 17), *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India.*

the East India Company were authorised to do by 3 & 4 Wm. IV, c. 85."

(ze) Illustrative examples to show difficulty of applying test.

The contradictory and anomalous results that may be reached by applying the theory of distinction between sovereign and non-sovereign acts may be also referred to here with some illustrative examples.

(zf) Personal injury.

In *Secretary of State* v. *Cockcraft*,[143] it was held as follows: The maintenance of roads is one of the functions of the Government and though that function may be delegated· to municipalities and local boards, it is still a sovereign function, especially where the road is maintained for military purposes, and the Secretary of State for India in Council exercising such sovereign function will not be liable for injuries sustained by a person coming against a heap of gravel stored on the road by a contractor, as it cannot be said to have been done in the conduct by the Government of undertaking, which might have been carried on by private persons.

Similarly, in *McInerny* v. *Secretary of State for India*,[144] it was held that no suit will lie against the Secretary of State claiming damages for negligence in respect of an accident which happened to the plaintiff on a public highway.

But in the *P. & O. S. N. Company's case*,[145] on which the above decisions were based, Sir Barnes Peacock, C. J., himself (at p. 14) expressed his opinion that the East India Company would have been liable for damages sustained in an accident caused by the negligence of its servants on a public road. He observed:

> "A gentleman returning home on a dark evening was dragged backwards out of the conveyance, in which he was driving himself by the wire of the electric telegraph which crossed the public road, and which hung loosely and so low that he was unable to pass under it; the gentleman was seriously injured, and lamed for life. Could it be said that, if the accident had occurred at the time of the East India Company they would not have been liable, if the accident had been proved to have been caused solely by the negligence of their servants?"

Another instance which may be given is the case of *John Vectis Carew Wyllie* v. *Secretary of State*.[146] In that case the Secretary of State was held liable for damages caused by the fall of a gate in a public garden on the plaintiff, resulting in his leg being broken.

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[143] 1915 Mad 993 (995) [AIR V 2] (DB).

[144] ('11) ILR 38 Cal 797 (800, 831) (DB).

[145] ('69) 5 Bom H C R (App) 1 (14), *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India.*

[146] 1928 Lah 346 (347) [AIR V 15] (DB).

(zg) Taxation matters.

In *Kader Zailany* v. *Secretary of State,*[147] in which it was held that a suit will not lie against the Secretary of State for damages for wrongful arrest by a police officer, the following passage occurs in the judgment of Heald J.:

> "It seems clear that suits may be brought against Government in respect of the acts of officers of Government employed in the collection of the revenue and in the financial or commercial concerns of the public and it is possible that in certain circumstances Government may be liable for torts committed by such officers."

But in *Nobin Chunder Dey* v. *Secretary of State,*[148] the Calcutta High Court emphatically held that matters relating to public revenue fall within the exclusive ambit of sovereign functions and as such removed from the purview of courts.

(zh) Jurisdiction and cause of action, distinction.

The opinion is sometimes expressed that although a court may have jurisdiction to entertain a suit against the Government in all cases in which the act complained of does not amount to an Act of State in the strict sense of the term and is subject to the municipal law of the country, yet, there may be no cause of action against the Government in some cases although in the same circumstances, a cause of action may exist as against a private person.[149] No doubt, this view is logically possible as jurisdiction and cause of action are two distinct conceptions and the mere fact that the jurisdiction of the Court is not barred will not necessarily mean that the suit against the Government will be maintainable or that the plaintiff's allegations will constitute a valid cause of action against the Government.[150] But this means that the Government as such will be entitled to immunity from liability under municipal law in some cases although under the same circumstances a private person would be liable to be sued in a court of law. This position is not correct. As already explained, the correct position is that if the act complained of is covered by the municipal law of a country and is not an 'act of State' in the strict sense of the term, a suit will lie against the Government in all cases in which a suit would lie against a private person unless there is any valid statutory bar to such a suit.[151]

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[147] 1931 Rang 294 (299, 300) [AIR V 18] (DB).

[148] ('76) ILR 1 Cal 11 (26) (DB).

[149] 1931 Rang 294 (299) [AIR V 18] (DB), *Kader Zailany* v. *Secretary of State.* (See the observations of Heald J. in this case.)

[150] 1937 Lah 572 (577) [AIR V 24] (DB), *Oma Parshad* v. *Secy. of State.*
('04) 6 Bom L R 131 (144) (DB), *Jehangir* v. *Secy. of State.*
[*See also* (1859-61) 8 Moo Ind App 108 (131) (PC), *Thomas Eales Rogers* v. *Rajendro Dutt.*]

[151] *See* ('04) 6 Bom L R 131 (149) (DB), *Jehangir* v. *Secy. of State.* (The doctrine laid down in Story on Agency, S. 319 and in *Tobun* v. *Queen* and in *Feather* v. *Reg.* as to the irresponsibility of the Crown does not apply in the ase of the East India Co. but in none of these cases and in no case that has

No doubt, in some important decisions[152] the question has been considered in terms of the jurisdiction of courts, and it has been held that the jurisdiction of the courts would not be barred if the act complained of does not constitute an act of State but is governed by the municipal law. But the plea has not even been raised in those cases that though the jurisdiction of the court was not barred and though a suit would have lain against a private person in the same circumstances, the suit against the Government would not lie, because the Government as such was entitled to an exemption from liability not applicable to a private person. The defence has only been that the Court had no jurisdiction to entertain the suit against the Government, the assumption all round being that if this plea was overruled, the suit would lie if a cause of action would arise under the law, in the same circumstances, against a private person.

(zi) Acts of public servants while exercising statutory authority.

In this connection, mention must be made of the view expressed in several decisions that a suit will not lie against the Government for the wrongful acts, or omissions, of public servants while exercising statutory authority and not merely acting under the orders of the Government (see NOTE 5 (m)). These decisions, it must be noted, do not proceed on any ground which is said to be peculiarly applicable to suits against the Government as such but proceed on a general ground, namely, that the maxim *respondeat superior* (let the principal answer) is subject to the exception that a master is not liable for the acts of his servants performed in discharge of a duty imposed by law.

(zj) Summary of discussion.

To sum up the above discussion, the following points seem to be clear :

The test of distinction between sovereign and non-sovereign acts laid down by Sir Barnes Peacock, C. J., in the *P. & O. S. N. Company's case*[153] for the purpose of determining the jurisdiction of Courts to entertain actions against the Government is, at the present day, not good law in the light of subsequent authorities, at least in the form in which the theory was propounded by Sir Barnes Peacock, C. J., The rule laid down by Sir Barnes Peacock, C. J., that no action will lie against the Government in the case of contracts entered into or acts done in the exercise of powers, which can only be lawfully exercised by a sovereign body or its agents and not by a private

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been cited, has it ever been suggested that the East India Co. would have been liable on any other ground except that which renders an ordinary principal liable for the acts of his agent.)

[152] (1857) 6 Moo Ind App 467 (529) (PC), *Stafford Bettesworth Haines* v. *The East India Company.*
('04) 6 Bom L R 131 (144) (DB), *Jehangir* v. *Secy. of State.*
(1882) ILR 5 Mad 273 (279) (DB), *Secretary of State* v. *Hari Bhanji.*

[153] ('69) 5 Bom H C R (App) 1, *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India.*

individual, has been subjected to several exceptions, even by the decisions which recognize a distinction between sovereign and non-sovereign acts for the purpose of seeing whether a suit will lie against the Government in a given case. For instance, it is settled law now that a suit *ex contractu* will lie against the Government even in its sovereign capacity.[154] It will be remembered that in *Nobin Chunder Dey's case*[155] it was held following the observations of Sir Barnes Peacock, C. J., in the *P. & O. S. N. Company's case*[156] that even a suit based on contract would not lie against the Government where it relates to what may be called a sovereign function of the Government. This view must now be definitely treated as not good law and *Nobin Chunder Dey's case*[157] must be treated as overruled by the Supreme Court decision in *State of Bihar* v. *Abdul Majid*[158] and also by the observations of the Privy Council in *Venkata Rao* v. *Secy. of State*[159] and *High Commissioner for India* v. *I. M. Lall.*[160]

As regards other kinds of suits, the cases have recognized that such suits will lie even in regard to acts done in sovereign capacity of the Government, in the case of trespass to immovable property or detention of land, chattels or money, or where the Government has profited by the act of the public servant.

Thus, the scope of the rule laid down by Sir Barnes Peacock, C. J., that an action against the Government would lie only if the act complained of is done in the conduct of an undertaking which can be lawfully carried on by a private individual or corporation, and not where the act has been done in the sovereign capacity of the Government, has been very much reduced in its application even by the decisions which are inclined to recognize a distinction between the sovereign and non-sovereign functions of the Government as the basis for determining whether a suit will lie against the Government in a given case. Apart from this, the rule laid down by Sir Barnes Peacock, C. J., has been definitely dissented from by the Madras High

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154. 1954 S C 245 (251) [AIR V 41 C 54] : 1954 S C R 786 (SC), *State of Bihar* v. *Abdul Majid.*

[*See also* 1948 P C 121 (127) (Pr 24) [A I R V 35 C 35] : 75 Ind App 225 : 1948 F C R 44 (PC), *High Commissioner for India* v. *I. M. Lall*
1937 P C 31 (35) [AIR V 24] (PC), *Venkata Rao* v. *Secretary of State.*]

155. ('76) I L R 1 Cal 11 (26, 27) (D B), *Nobin Chunder Dey* v. *Secretary of State.*

156. ('69) 5 Bom H C R (App) 1, *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India.*

157. ('76) ILR 1 Cal 11 (DB), *Nobin Chunder Dey* v. *Secretary of State.*

158. 1954 S C 245 [AIR V 41 C 54] : 1954 S C R 786 (SC).

159. 1937 P C 31 (35) [AIR V 24] (PC).

160. 1948 P C 121 (127) [AIR V 35 C 35] : 75 Ind App 225 : 1948 F C R 44 (PC).

Court in *Secretary of State for India in Council* v. *Hari Bhanji*,[161] by the Bombay High Court in *Jehangir* v. *Secretary of State*,[162] by the Assam High Court in the *Union of India* v. *Murlidhar Agarwalla*[163] and by Mukerjea, J., of the Supreme Court in *Province of Bombay* v. *Khushaldas Advani*.[164]

The rule also seems to be at variance with the principles laid down by the Privy Council in *Secretary of State in Council of India* v. *Kamachee Boye Sahaba*,[165] *Forester* v. *Secretary of State*[166] and *Eshugbayi Eleko* v. *Officer Administering Government of Nigeria*.[167] According to these principles, the cognizance by Courts seems to be excluded only in the case of acts which strictly fall in the category of acts of State, that is, acts done in the course of dealings with foreign States and subjects of foreign States and not in the case of acts which are done under the sanction of municipal law, irrespective of the question whether such acts are done in the conduct of undertakings which can be lawfully carried on by a private individual or in the exercise of powers which can lawfully be exercised only by a sovereign body or its agents and not by a private individual.

The observations of Lord Haldane in *Moment's case*[168] at first sight appear to support the distinction between sovereign and non-sovereign functions of Government for the purpose of determining the jurisdiction of Courts in suits against the Government, made by Sir Barnes Peacock, C. J., in *P. & O. S. N. Co's case*.[169] But for reasons already explained, this does not seem to be really the case, and the decision of the Privy Council in *Moment's case*[170] does not seem to go beyond holding that a suit involving a claim over land, would have lain against the East India Company although an action could not have been brought against the *British Crown* in such a case.

The contradictions, which result from the actual application of the distinction drawn by Sir Barnes Peacock, C. J., have already been discussed.

(zk) Conclusion.

Thus, the distinction between sovereign and non-sovereign functions as propounded by Sir Barnes Peacock, C. J., in *P. & O. S. N.*

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[161] ('82) I L R 5 Mad 273 (DB).
[162] ('04) 6 Bom L R 131 (DB).
[163] 1952 Assam 141 [AIR V 39] : I L R (1951) 3 Assam 279 (DB).
[164] 1950 S C 222 [AIR V 37 C 18] : 1950 S C R 621 (SC).
[165] (1857-59) 7 Moo Ind App 476 (PC).
[166] ('72) Ind App (Supp. Vol 10) (PC).
[167] 1931 P C 248 [AIR V 18] (PC).
[168] ('13) ILR 40 Cal 391 (399), (PC), *Secretary of State* v. *Moment.*
[169] ('69) 5 Bom H C R (App) 1, *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India.*
[170] ('13) ILR 40 Cal 391 (PC), *Secretary of State* v. *Moment.*

Company's case[171] does not seem to be, on the authorities, a safe and reliable rule of guidance for determining in what cases a suit will lie against the Government. The true principle appears to be that laid down by the Madras High Court (Turner C. J. and Muttusami Ayyar J) in *Secretary of State for India in Council* v. *Hari Bhanji*,[172] namely, that the acts done by the Government in its sovereign capacity should be divided into two classes those which lie outside the province of municipal law and those that fall within that law and it is of the former only that the municipal courts of this country cannot take cognizance. Acts of the Government, which are done under the sanction of municipal law, are not removed from the cognizance of Courts, although the acts are done in the exercise of powers which can be lawfully exercised only by a sovereign body or its agents and not by a private individual.

Support for this view is also derived from the Introduction to the Ninth Edition (1952) of Dicey's LAW OF THE CONSTITUTION, pages cl-cli. It is observed there as follows :

> "It is clear that no suits would have lain against the East India Company, and therefore not against its successors today, for Acts of State. There is, however, a class of acts which no private individual or trading corporation could have accomplished. For these, so far as they fall within their sphere, the Governments of the Provinces are now liable. In other words, liability extends to all wrongful acts which are not covered by the narrow meaning which the Courts apply to the true Act of State, whether or not they be acts which could have been done by a private individual or trading corporation."

It has already been seen above that in England the Crown Proceedings Act of 1947, subject to certain exceptions, enables civil proceedings to be taken against the Crown in the same circumstances as they can be taken against a subject.[173] Thus, it would be anachronistic to stick to the rule of distinction drawn by Sir Barnes Peacock, C. J., between acts done in the conduct of undertakings which can be lawfully carried on by a private individual and those done in the exercise of powers which can only be lawfully exercised by a sovereign body or its agents and not by a private individual.

In view of the unsatisfactory and confusing state of the case-law it is desirable that the position is clarified by suitable legislation. There is ample scope for such legislation provided by the article itself under which the provision as to Government suing or being sued in

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171. ('69) 5 Bom H C R (App) 1 (15, 16), *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India.*

172. ('82) ILR 5 Mad 273 (279) (DB).

173. Halsbury's Laws of England, 3rd Edition (Simonds), Vol. XI, page 4, Pr. 3.

like cases as the Dominion of India or the corresponding Provincial Government might have sued or been sued if the Constitution had not been passed, is expressly made subject to legislation by Parliament or the State Legislature.

(zl) Power of Legislature to modify article.

(zl) Power of Legislature to modify provisions of this article as to cases in which Government can sue or be sued—See NOTE 9.

(zm) Part B States.

The above discussion only applies to suits against the Central Government and the Governments of Part A States. In the case of States which correspond to what were Indian States before the Constitution, the question whether a suit by or against the Government of such a State will lie will depend on the question whether under similar circumstances a suit would have lain by or against the Government of the corresponding State.

See also NOTE 18.

4. Suits on contracts. — It can be taken as settled law now that a suit on contract or *quantum meruit* will lie against the Government irrespective of the question whether the contract was entered into on behalf of the Government in the conduct of an undertaking which can be lawfully carried on by a private person or it was entered into in the exercise of powers which can be lawfully exercised only by a sovereign body or its agents and not by a private person.[1]

In *Nobin Chunder Dey* v. *Secretary of State for India*[2] it was held by the Calcutta High Court, following the observations of Sir Barnes Peacock, C. J., in *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State*,[3] that a suit based on contract would not lie against the Secretary of State where the contract had been entered into in the course of transactions which can be lawfully conducted only by the sovereign body and not by a private individual. This view is no longer good law and the above decision of the Calcutta High Court and the observations of Sir Barnes Peacock, C. J., on which it is based, must be treated as overruled by the Privy Council and the Supreme Court. (See NOTE 3 (zj).)

(a) General and Introductory.

5. Suits on tort. — The general question as to in what cases a suit will lie against the Government has been discussed in NOTE 3. The question in what cases a suit based on *tort* will lie against the

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Article 300 — Note 4

[1] 1954 S C 245 (251) (Pr 17) [A I R V 41 C 54] : 1954 S C R 786 (SC), *State of Bihar* v. *Abdul Majid*.

1948 P C 121 (127) (Pr 24) [A I R V 35 C 35] : 75 Ind App 225 : 1948 F C R 44 (PC), *High Commissioner for India* v. *I. M. Lall*.

1937 P C 31 (35) [AIR V 24] (PC), *Venkata Rao* v. *Secretary of State*.

[2] ('76) ILR 1 Cal 11 (26, 27) (DB).

[3] ('69) 5 Bom H C R (App) 1.

Government must be considered in the light of the discussion in NOTE 3 (zc). It has been seen in that Note that there is a conflict of decisions as to the general principles according to which the question of maintainability of a suit against the Government must be determined. As seen in that Note, the main question round which the controversy has centred is as to whether the test of distinction between acts done in the conduct of undertakings which can be lawfully carried on by private individuals and acts which can only be carried on by the Sovereign or his agents and cannot be lawfully carried on by private individuals is a sound test for distinguishing cases in which a suit will lie against the Government and those in which such a suit will not lie. The question has been thoroughly canvassed in Note 3 and it has been seen that the above test which was first propounded by Sir Barnes Peacock, C. J., in *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State*[1] is not a sound one and is not a safe rule of guidance at the present day. It has also been seen in NOTE 3 (zk) that the true principle is that in all cases in which the act complained of does not amount to an Act of State in the strict sense of the term and purports to be done under the sanction of municipal law, the legality of the act can be questioned in a court of law. This general principle is also applicable to cases based on *tort* as well as those based on *contract*. (See NOTE 4.)

Although the question involved is a general one, it has been seen in NOTE 3 that on the authorities as they are now, it is only in regard to suits on *contracts* that it is settled that the Government as such cannot claim any immunity from the liability of being sued. In regard to suits on torts, the general view is that subject to certain exceptions, a suit based on tort will not lie against the Government in respect of the acts and defaults of its servants. (See NOTE 3 (zc).) It has been seen that there are even *obiter dicta*, to this effect, of the Supreme Court in *State of Bihar* v. *Abdul Majid*.[2] As the relevant decisions have been fully discussed in NOTE 3 in connection with the general question, it is not necessary to refer to all the decisions in this NOTE again as regards the *principles* applicable to the question as to in what cases a suit on *tort* will lie against the Government. But it would be convenient to summarise the main decisions on the subject.

(b) Negligence of public servants — Injury to person or property — Damages, suit for.

In *Secretary of State* v. *Cockcraft*,[3] it was held by the Madras High Court that a suit for damages will not lie against the Government for personal injury suffered by the plaintiff as a result

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Article 300 — Note 5

[1] ('69) 5 Bom H C R App 1 (15, 16).

[2] 1954 S C 245 (250, 251) [AIR V 41 C 54] : 1954 S C R 786 (S C).

[3] 1915 Mad 993 (995) [AIR V 2] (DB).

of an accident which happened to him on a public highway owing to the negligence of the servants of the Government. The ground of decision was that the maintenance of a highway is a sovereign function of the Government and there can be no suit against the Government in respect of such a function. A similar decision was also given by the Calcutta High Court in *McInerny* v. *Secretary of State*.[4]

As seen in NOTE 3, the above view is inconsistent with the view expressed by Sir Barnes Peacock, C. J., in the *P. and O. S. N. Company's case*[5] and of the Lahore High Court in *John Vectis Carew Wyllie* v. *Secretary of State*.[6] (See NOTE 3 (zf).)

(c) Money payable to plaintiff wrongly paid to another person.

In *Uday Chand Mahtab* v. *Province of Bengal*,[7] it was held that a suit would not lie for damages against the Government, where a Collector holding a *patni* sale had paid the sale proceeds to a wrong person. This decision proceeded on the ground that the act complained of was done in the exercise of a function of a "sovereign" character.

A similar decision is that of the Calcutta High Court in *Moti Lal Ghose* v. *Secretary of State for India*.[8] In that case, certain money was seized from the house of the plaintiff on the suspicion that he was involved in a dacoity and that the money was stolen property. He was subsequently tried for dacoity but acquitted. Thereupon he applied for recovery of the money seized from him, and eventually obtained an order from the High Court for such payment. But in the meanwhile the Magistrate had paid over the money to the person in whose house the dacoity had taken place. Thereupon the plaintiff brought a suit against the Government for recovery of the money with interest and costs. It was held by the Calcutta High Court that the suit would not lie.

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[4] ('11) I L R 38 Cal 797 (800, 801).

[5] ('69) 5 Bom H C R (App) 1, *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India*.

[6] 1928 Lah 346 [AIR V 15].

[7] ('47) I L R (1947) 2 Cal 141 (149) (DB).
[*See also* 1934 Cal 128 (131) [A I R V 21] (D B), *Secretary of State* v. *Ramnath Bhatta*. (Surplus of proceeds of sale held by Deputy Collector paid to wrong person — No benefit derived by the Government by such payment—Secretary of State not liable.)]

[8] ('05) 1 Cal L Jour 355 (359) (DB). (In cases of torts committed by Government officials the person to be sued is the person who has actually done the alleged wrongful act. Further, the Magistrate who had passed the wrong order was exempt from liability, under Act XVIII of 1850 —It is inconceivable that the Government, the principal, should be held liable — There was no specific exemption in the case of the Government as in the case of the Magistrate because there was no liability at all in the first instance.)

(d) Negligence of hospital employees — Child handed over to unknown person and not traceable.

It was held by the Madras High Court in *Etti* v. *Secretary of State*,[9] that a suit for damages will not lie against the Government where through the negligence and mistake of the employees in a Government hospital a child which had been admitted in the hospital for treatment was handed over to a wrong person on discharge and the parents of the child were unable to trace the child thereafter. This decision also proceeded on the ground that the act complained of pertained to an activity of the Government which was of a "sovereign" character.

(e) Payment of money on forged cheque.

In *District Board, Bhagalpur* v. *Province of Bihar*,[10] loss was caused to a party by the negligence of certain Government officials which had resulted in certain moneys being paid out of the Government treasury on the basis of forged cheques. It was held that a suit will not lie against the Government in such a case.

(f) Loss of property through negligence or fraud of Government servant.

In *Shivabhajan Durga Prasad* v. *Secretary of State*[11] a suit was instituted against the Secretary of State in Council to recover damages on account of the negligence of a chief constable with respect to goods seized. It was held that the suit was not maintainable inasmuch as the chief constable seized the goods not in obedience to an order of the executive Government but in performance of a statutory power vested in him by the Legislature, and the seizure of the goods was not in any sense productive of benefit to the revenue of the Government nor was it a transaction out of which profit could be derived and there had been no ratification or adoption of the act. The above decision was followed by the Allahabad High Court in a similar case in *Ram Gulam* v. *U. P. Government*.[12] See also the undermentioned case.[13]

(g) Misappropriation by Government manager.

In *Secretary of State* v. *Sri Gobinda Chaudhury*,[14] it was held that where a person's estate is taken over by the Court of Wards for management and then released, he cannot sue the Secretary of State for India for damages on the ground that the manager of the estate appointed by the Court of Wards has not done his duty by realising all moneys due to the estate with due diligence or has not accounted to the Court of Wards for certain moneys which he collected.

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[9] 1939 Mad 663 (666) [AIR V 26] (DB).

[10] 1954 Pat 529 (539) (Pr 46) [AIR V 41 C 177] (DB).

[11] ('04) ILR 28 Bom 314 (326) (DB).

[12] 1950 All 206 (210) [AIR V 37 C 79] : I L R (1951) 1 All 135 (DB).

[13] 1937 Lah 572 (577) [A I R V 24] (DB), *Oma Parshad* v. *Secretary of State*. (Property stolen from plaintiff's house — Property recovered by police but misappropriated by the custody officer—No suit lies against Secretary of State for recovery of *value*—Master not liable for unlawful and unauthorised act of his servant.)

[14] 1932 Cal 834 (841) [AIR V 19] (D B).

(h) Wrongful arrest and detention by police.

No suit for damages will lie against the Government for wrongful arrest and detention of plaintiff by the Police.[15]

(i) Wrongful conviction and sentence to imprisonment.

Where a person is convicted of a criminal offence and sentenced to imprisonment and subsequently such person is able to prove his innocence, he cannot sue the Government for damages.[16]

(j) Trespass to immovable property.

A suit will lie against the Government for damages for trespass by a Government servant, acting as such, on plaintiff's property.[17] If such trespass is accompanied by damage to property taken for use and occupation, the Government would be liable for such damage.[18]

(k) Commandeering order.

Where under the Defence of India Act (1915) the Government passed a commandeering order in respect of certain articles belonging to the plaintiff but failed to take the articles and pay for them, it was held that the plaintiff could not sue the Government for damages for the loss suffered by him.[19]

(l) Order closing labour depot.

The Madras High Court has held that no action will lie against the Government for damages caused by an order of a Collector closing plaintiff's depot for recruitment of labour.[20]

(m) Acts of public servants while exercising statutory authority.

Apart from the principle that the Government is not liable to be sued for the acts or defaults of its servants while exercising what may be called "sovereign" powers (i. e., powers which can be lawfully exercised only by the sovereign body or its agents and not by a private individual), another proposition has also been laid down in some decisions which would preclude a suit on tort being brought against the Government in regard to acts or defaults of public servants acting in their public capacity. This principle is to the effect that where the act complained of has been done by the public servant while exercising a *statutory* authority, and not under the orders of the Government, the Act cannot give rise to a suit against the Government.[21] This proposition is based on the principle that "where the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment."[22]

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[15] 1942 Mad 539 (549, 550) [AIR V 29] (DB), *Gurucharan Kaur* v. *Madras Province*. (Private employer would be liable for civil injury committed by his servant in the course of his employment—But Government cannot be held liable when an officer takes an action in pursuance of a statutory duty or when the act committed by him happens to be either done by the Government's express orders or is subsequently ratified and adopted by it.)
1931 Rang 294 (300) [AIR V 18] (D B), *Kader Zailany* v. *Secretary of State*.
[Compare ('03) ILR 30 Cal 872 (879, 880) (P C), *Md. Yusufuddin* v. *Secretary of State*. (Observations in this case suggest that a suit for false imprisonment might lie in such cases, but in A I R 1931 Rang 294 (298), the observations were explained as being merely casual observations about a matter which was not directly in issue before the Privy Council.)]

[16] 1931 Oudh 29 (31) [AIR V 18] (D B), *Mata Prasad* v. *Secretary of State*.

[17] 1953 Assam 116 (127) (Pr 66) [AIR V 40 C 53] (D B), *Union of India* v. *Ram Kamal*.

[18] 1953 Assam 116 (127) [AIR V 40 C 53] (D B), *Union of India* v. *Ram Kamal*.
[*See also* ('13) ILR 40 Cal 391 (339) (P C), *Secretary of State* v. *Moment*. (Suit against Government for damages for wrongful interference with plaintiff's property—Suit lies.)]

[19] 1928 Cal 74 (81) [AIR V 15], *Kessoram Poddar* v. *Secretary of State* (A commandeering order is one which none but a Government can make and being an act of the Sovereign, the Secretary of State cannot be sued in respect of it.)

[20] 1915 Mad 434 (442) [AIR V 2], *Ross* v. *Secretary of State*.

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[21] 1950 All 206 (210) [AIR V 37 C 79]: ILR (1951) 1 All 135 (DB), *Ram Gulam* v. *Government of U. P.*

1934 Cal 128 (131) [AIR V 21] (D B), *Secretary of State* v. *Ramnath Bhatta.* (Secretary of State is not liable for wrongful act of a Deputy Collector in performance of his statutory duties, caused by the error or delinquency of the subordinate staff under the Collector, where no benefit is caused to Government by such act)

1931 Rang 294 (300) [AIR V 18] (D B), *Kader Zailany* v. *Secretary of State.* (General rule seems to be that Government is not liable for wrongs done by its officers unless the wrongful act is done either by its order or on its behalf being subsequently ratified or adopted by it and is not ordinarily liable for wrongs done by subordinate public officers in the exercise of powers given to them by law.)

('04) I L R 28 Bom 314 (325) (DB), *Shivabhajan Durga Prasad* v. *Secretary of State.* ("Before it can be said that a liability on account of the Government of India has been incurred by the Bombay Government as the result of the act or omission of the Chief Constable so as to be chargeable on the revenues, it is necessary to exclude those conditions which would afford a principal exemption from liability for the act of an agent.")

('04) 6 Bom L R 131 (230) (D B), *Jehangir* v. *Secretary of State.* ("Such an action as the present could not have been maintained against the East India Company before its abolition, because the act complained of as a libel was the act of individuals done by them in excess of the statutory authority which strictly defines the limits of their powers as the Governor in Council of Bombay.")

[*See also* ('05) 1 Cal L Jour 355 (359) (D B), *Moti Lal Ghose* v. *Secretary of State.* (Money paid to wrong person by order of Magistrate under Criminal Procedure Code, S. 517—Suit against Secretary of State does not lie.)]

[22] (1864) 143 E R 1148 (1162) : 33 L J P C 199, *Tobin* v. *The Queen.*

1950 All 206 (210) [AIR V 37 C 79] : I L R (1951) 1 All 135 (D B), *Ram Gulam* v. *U. P. Government.* (The maxim *respondeat superior* is subject to the well-recognized exception that a master is not liable for the acts of his servants performed in discharge of a duty imposed by law.)

1932 All 575 (579, 580) [AIR V 19] (DB), *Ram Shankar* v. *Secretary of State.* (Official Receiver cannot bind Secretary of State by contract entered into by him on behalf of insolvent—When duty to be performed has been imposed by law and not by will of party employing the agent, the employer is not liable for the wrong done by the agent in such employment.)

(1904) I L R 28 Bom 314 (325) (D B), *Shivabhajan Durga Prasad* v. *Secretary of State.*

It is doubtful whether the liability of the Government for the torts committed by public servants in the course of their employment can be excluded on the above principle. In this connection the observations of Ramaswami Iyer in his LAW OF TORTS (4th Edition, 1950) at p. 586 may be quoted :

> "The principle of these cases was stated to be that the act done by a servant of Government was done in the exercise of the authority or discretion vested in him by law or statute and not in pursuance of any implied authority of Government. It is difficult to accept this reasoning, as vicarious liability does not rest on any principle of implied authority. Much less does it require express authority or ratification by the employer. This requirement is intelligible in the case of a superior servant sought to be held liable for an act of his subordinate but has no meaning in the case of the Government who is the ultimate employer. It is submitted that the true rule is that the Government is liable for any illegal act of its servants or agents in the course of performing its work. This of course, assumes that the act is illegal and a suit lies against him. Otherwise there can be no suit against Government as employer."

6. Act of State. — As seen in NOTE 3, no suit will lie against the Government where the act complained of constitutes an Act of State.[1] See also ART. 226, NOTES 32 and 40.

7. Acts of Courts. — The State is not liable to be sued in a court of law for the erroneous orders of judicial officers and acts done in pursuance of such orders.[1]

Article 300 — Note 6

[1] 1954 Cal 591 (597) (Pr 18) [AIR V 41 C 202] : 1954 Cri L Jour 1732 (D B), *Shri Krishna Sharma* v. *The State of West Bengal.* (Though municipal Courts are competent to enquire into matters involving the construction of treaties and other acts of State, treaty obligations cannot be enforced in municipal Courts. The term 'Act of State' is sometimes used loosely to express any lawful act done by the executive Government and if it affects the person or property of subjects within its jurisdiction its legality can be questioned in municipal Courts.)

Article 300 — Note 7

[1] 1931 Oudh 29 (31) [AIR V 18] (D B), *Mata Prasad* v. *Secretary of State.* (Conviction and sentence for criminal offence impeached as being wrong—Discovery of fresh evidence proving innocence of accused person — Suit will not lie for damages for wrongful conviction and imprisonment.)

1937 All 158 (159, 160) [AIR V 24], *Bateshwari Prasad* v. *Secretary of State.* (A person's relatives were fined by a criminal Court and to realise the fine the person's property was attached and sold in spite of his objection that the property belonged to him and not to the accused—No suit for damages will lie against the Government for the erroneous order of the Court overruling the owner's objection.)

1922 All 276 (277) [AIR V 9] (D B), *Maha Nirbani* v. *Secretary of State.* (Court Inspector under lawful warrant obtained possession of ornaments from appel-

Although this position is unimpeachable, the reason on which the conclusion is based in some of the decisions,[2] namely, that in such cases the act complained of relates to the exercise of sovereign functions by the State, is not correct. As seen in NOTE 3, the test of distinction between sovereign and non-sovereign functions is not a correct test for the purpose of determining in what cases a suit will lie against the Government. The true reason why the suit will not lie against the Government in regard to judicial orders and acts done in pursuance thereof is that however erroneous the judicial orders may be, no actionable wrong under the law is committed by the passing of such orders.

Another reason adduced is that in such cases, the acts complained of are done by the officers concerned in the exercise of their statutory powers and hence, the Government, even assuming it to be in the position of a principal to an agent in regard to the officer in question, cannot be held responsible for the acts of the officer.[3] It has been

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lant pawnce — They were improperly ordered to be returned to real owner by Magistrate who committed case—Assistant Sessions Judge tried to rectify mistake before owner was declared insolvent—*Held* Secretary of State was not liable – Courts are not servants or agents of Secretary of State and he is not liable for damages if they make mistake.)

('05) 1 Cal L Jour 355 (359) (DB), *Moti Lal Ghose* v. *Secretary of State*. (Money seized from *M* on suspicion of its being stolen property—Theft charge not proved—*M* claiming return of money— Application rejected and money paid to complainant by Magistrate's order — *M suing* Secretary of State for return of money—*Held* suit did not lie.)

[*See also* ('47) I L R (1947) 2 Cal 141 (149) (D B), *Uday Chand Mahtab* v. *Province of Bengal.* (Collector holding *patni* sale paying sale proceeds to wrong person—No suit would lie against Government for damages for this.)

1934 Cal 128 (131) [AIR V 21] (D B), *Secretary of State* v. *Ramnath Bhatta.* (Surplus proceeds of sale held by Deputy Collector paid to wrong person — No benefit derived by Government by such payment—Secretary of State not liable to be sued.)

1932 All 575 (579, 580) [AIR V 19] (DB), *Ram Shankar* v. *Secretary of State.* (Official Receiver cannot bind Secretary of State by contract entered into by him on behalf of insolvent.)]

[Compare 1915 Bom 227 (227, 228) [AIR V 2] (D B), *Wasappa Timappa* v. *Secretary of State.* (Ornaments in plaintiff's house seized on suspicion of their being stolen property—They were then, in spite of plaintiff's claim and objection, sold and sale proceeds credited to Government — Then plaintiff sued for the amount on the allegation that the property was his—Suit decreed. *Note.*—It must be noted that this was not a suit for damages for tort but an ordinary suit claiming certain property from the Government.)]

[2] *See* ('47) I L R (1947) 2 Cal 141 (149) (DB), *Uday Chand Mahtab* v. *Province of Bengal.*

1931 Oudh 29 (31) [AIR V 18] (D B), *Mata Prasad* v. *Secretary of State.*]

[3] *See* ('05) 1 Cal L Jour 355 (359) (DB), *Moti Lal Ghose* v. *Secretary of State.* [*See also* 1932 All 575 (579, 580) [AIR V 19] (D B), *Ram Shankar* v. *Secretary of State.*]

pointed out in NOTE 5 that this line of reasoning is also open to serious doubt.

A third line of reasoning is that Courts and judicial officers are not acting as agents of the Government.[4] This line of reasoning is also not satisfactory, because, as seen in NOTE 2, the suit against the Government is, in truth and substance, one against the State, and not merely against the executive organ of the State, and the judiciary is undoubtedly an agency of the State taken as a whole.

The true reason, therefore, as already stated, is that no tort at all is committed in such cases merely because the order of the judicial officer happens to be erroneous.

Under the Judicial Officers' Protection Act, 18 of 1850, no Judge, Magistrate, Justice of the Peace, Collector, or other person acting judicially, shall be liable to be sued in any Civil Court, for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of: and no officer of any Court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector, or other person acting judicially, shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same.

8. **Suit for injunction.** — The Government, as such, is not immune from the liability of being sued for injunction.[1] Thus, a suit for injunction against the Government will lie to restrain an illegal assessment to agricultural income-tax even though only a notice to file a return has been issued.[2] As to Governments' duty to respect

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[4] 1922 All 276 (277) [AIR V 9] (D B), *Maha Nirbani* v. *Secretary of State.* ((1899) I L R 21 All 341, Foll.)
[*See* 1937 All 158 (160) [AIR V 24], *Bateshwari Prasad* v. *Secretary of State.*]

Article 300 — Note 8

[1] 1951 S C 23 (27) [AIR V 38 C 8] : I L R (1952) 1 Cal 119 : 1951 S C R 1 : I L R (1951) Hyd 372 (S C), *State of Tripura* v. *East Bengal.*
1943 Lah 41 (47) [AIR V 30] (F B), *Lahore Electric Supply Co. Ltd.* v. *Province of Punjab.*

[2] 1951 S C 23 (27, 31, 34) [AIR V 38 C 8] : I L R (1952) 1 Cal 119 : 1951 S C R 1 : I L R (1951) Hyd 372 (S C), *State of Tripura* v. *East Bengal.* (The words "liability in respect of an actionable wrong" used in Art. 10 (2) (a) of Indian Independence (Rights, Property and Liabilities) Order (1947) should not be understood in the restricted sense of a liability for damages for completed tortious acts. The words are apt to cover the liability to be restrained by injunction from completing what on the plaintiff's case was an illegal or unauthorised act already commenced. The service of a notice requiring a return of income to be furnished for assessment under the Bengal Agricultural Income-tax Act is a step fraught with serious consequences to the assessee. and

injunction issued not directly against the Government but against a private party, see NOTE 24.

9. Power of Legislature to affect right conferred by this article.—Under cl. (1) of this article, the Government of India and the Government of a State may sue or be sued in relation to their respective affairs in the like cases as the Dominion of India or the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted. As seen in NOTE 3, there was a similar provision in S. 176 of the Government of India Act of 1935, and also in the Government of India Acts of 1919 and 1858. As a result of these provisions, the question as to in what cases the Government can sue or be sued resolves itself into the question as to in what cases the East India Company could have sued or been sued, immediately before the Government of India Act of 1858. See NOTE 3 (a).

But the above provision in this article is expressly made subject to any provisions which may be made by Act of Parliament or by the Legislature of a particular State. Hence, it is open to the Parliament or to the Legislature of a State to enact a law giving a right of suit in favour of or against the Government in a case in which such right did not exist previous to the Constitution or taking away or restricting a right of suit which existed previously.[1] A similar provision is contained in the corresponding S. 176 of the Government

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if the assessment proposed was illegal and unauthorised by reason of the Act itself being ultra vires in so far as it purported to make the Rulers of Indian States liable to taxation thereunder as contended for by the plaintiff, the service of such notice marked the commencement of a wrongful act against the plaintiff by the Bengal Government under colour of the Act and such a wrongful act is actionable in the sense that an action would lie in a civil Court for an injunction restraining its completion. That was the liability to which the Province of Bengal was subject according to the plaintiff's case at the time when he instituted the suit, and that liability passed to the Province of East Bengal by virtue of Art. 10 (2) (a).)

1943 Lah 41 (47) [AIR V 30] (DB), *Lahore Electric Supply Co. Ltd.* v. *Province of Punjab.* (Section 306 of Government of India Act, 1935, corresponding to Art. 361 of the present Constitution granting personal exemption to Governor-General, Governor and Secretary of State, from legal proceedings, is no bar to such a suit.)

Article 300 — Note 9

[1] *See* 1952 Assam 159 (166) (Pr 12) [AIR V 39] : ILR (1952) 4 Assam 275 (DB), *Union of India* v. *Mahim Chandra.* (Indian Independence Pakistan Courts (Pending Proceedings) Act (1952), S. 3 — Act does not contravene Arts. 31, 19, 300 of the Constitution and is *intra vires*—Art. 300 was not intended to place any such restriction on the legislative powers of the Government of India in this respect, which admittedly include the power to deprive any person of his property by authority of law and also to take away vested rights even against the Government by authority of law. The impugned legislation does not in any way contravene Art. 300.)

of India Act, 1935, also. But the corresponding S. 32 of the Government of India Act of 1919 and S. 65 of the Government of India Act of 1858 did not contain such a provision. In the absence of such a provision, it was held that the legislative enactment, which purported to bar the jurisdiction of the civil Courts in any case in which a suit would have lain against the East India Company was *ultra vires.*[2] Similarly, a legislative enactment, making the Government liable to an action in a case in which the East India Company would not have been liable, would also be *ultra vires* under the Government of India Act of 1858 and that of 1919.[3] But S. 32 of the Government of India Act of 1919 or S. 65 of the Government of India Act of 1858 does not affect the validity of an Act of the Indian Legislature which itself *creates* an obligation and provides an exclusive code for its determination.[4]

In *Venkata Rao* v. *Secretary of State,*[5] the Privy Council observed as follows:

> "Their Lordships are not disposed to think that this section (S. 32 of the Government of India Act of 1919), which is a section relating to parties and procedure, has an effect to limit or bar the right of action of a person entitled to a right against the Government, which would otherwise be enforceable by action against it, merely because an identical right of action did not exist at the date when the East India Company was the body, if any, to be sued."

The above observations would seem to show that, even under S. 32 of the Government of India Act of 1919, the *creation* of statutory rights against the Government enforceable by action in a court of law was not prohibited even though there might not have been a similar right in the days of the East India Company.

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[2] ('13) ILR 40 Cal 391 (400, 401) (P C), *Secretary of State* v. *Moment* (Section 41 (b) of the Burma Town and Village Lands Act (Burma Act IV of 1898) which enacted that "no Civil Court shall have jurisdiction to determine any claim to any right over land as against the Government," was *ultra vires* of the Lieutenant Governor of Burma in Council, and therefore invalid.)

[3] 1915 Mad 434 (440) [AIR V 2], *Ross* v. *Secretary of State.* (An enactment adding to or taking away from the liability of the Secretary of State in Council to be sued as settled by the Government of India Act 1858 is *ultra vires* of the Indian Legislature as opposed to the provisions of the Councils Act, (1861).)

[4] 1940 P C 105 (111) [AIR V 27] (P C), *Secretary of State* v. *Mask and Co.* (Such an obligation is not covered by sub-s. (2) of S. 32 and therefore an exclusion of the subject's right of resort to the Civil Courts by Ss. 188 and 191, Sea Customs Act, is not *ultra vires* of the Indian Legislature : ('13) ILR 40 Cal 391 (P C) Explained.)

[*See also* 1947 P C 78 (81) (Pr 24) [AIR V 34 C 19] : 74 Ind App 50: 1947 F C R 59 : I L R (1947) Kar (P C) 178 (PC). *Raleigh Investment Co.* v. *Governor-General-in-Council.* (Jurisdiction to question assessment otherwise than by use of the machinery expressly provided by the Income-tax Act would appear to be inconsistent with the statutory obligation under S. 45 of the Act to pay the tax arising by virtue of assessment.)]

[5] 1937 P C 31 (35) [AIR V 24] (PC).

The power of the Legislature to add to the liability of the Government to be sued in a court of law or to take away such liability is, as has been seen above, recognized both under this article and the corresponding S. 176 of the Government of India Act of 1935. Hence, the validity of legislative enactments passed under the Government of India Act, 1935 or under this Constitution cannot be questioned on the ground of its enlarging or abridging the liability of the Government, to be sued in a Court, as compared to what it was in the days of the East India Company. But Acts passed by the Indian Legislatures before the Government of India Act, 1935 was passed, are liable to be questioned as contravening the provision of S. 32 of the Government of India Act of 1919 or of S. 65 of the Government of India Act of 1858, if they affect the liability of the Government to be sued as laid down in those sections.

9a. Bar of suit. — See NOTE 9.

10. "Can sue or be sued." — The word "sue", as used in this article, is not used in the technical and narrow sense of a civil proceeding which is instituted by the presentation of a plaint. The word is wide enough to include writ proceedings.[1a] A writ of certiorari will, therefore, lie against a State Government. This is expressly made clear in ART. 226 of the Constitution. But in the absence of a similar article in the Government of India Act, 1935, it was contended before the Supreme Court in the *Province of Bombay* v. *Khushaldas*[1] that a writ of certiorari could not be issued against the Provincial Government. This contention was rejected by Mahajan and Mukherjea, JJ., who considered the question in their judgments. (The other Judges, who constituted the majority, did not consider the question as it did not arise for decision in the view they took of the case.) In rejecting the contention, Mahajan and Mukherjea, JJ., expressly relied upon S. 176 of the Government of India Act, 1935. It was contended that the section only applies to suits and actions and did not cover a case of a writ of certiorari. With reference to this contention Mahajan, J., observed as follows :

> "The expression 'sue' means the enforcement of a claim or a

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Article 300 — Note 10

[1a] 1955 Cal 581 (584) (Prs 4, 6) [AIR V 42 C 182], *Union of India* v. *Satyendra Nath*, (The Indian Union can apply to a High Court for a writ of *certiorari* or other appropriate writ under Art. 226.)

[1] 1950 S C 222 (236, 246, 248, 249) (Prs 51, 106, 114, 124) [AIR V 37 C 18]: 1950 S C R 621 (SC). (On this point the view of Mahajan and Mukherjea JJ. was the same as that of the Bombay High Court in the lower Court in A I R 1949 Bom 277.)

civil right by means of legal proceedings. When a right is in jeopardy, then any proceedings that can be adopted to put it out of jeopardy fall within the expression 'suit'. Any remedy that can be taken to vindicate the right is included within the expression. A writ of certiorari, therefore, falls within the expression 'sue' used in S. 176 of the Government of India Act, 1935, and the remedy, therefore, is within the express terms of the statute."

The expression "sue" would include execution proceedings also.[2]

The expression "can be sued" will enable the Government to be impleaded as a party to a suit already instituted.[3]

11. Form of suit. — The article requires that a suit by or against the Government of India must be brought in the name of the Union of India and that a suit by or against the Government of a State must be brought in the name of the State. Section 79 of the Civil Procedure Code accordingly provides that in a suit by or against the Central Government, the authority to be named as plaintiff or defendant, as the case may be, shall be the Union of India and the authority to be named as plaintiff or defendant, as the case may be, in a suit by or against tate Government, shall be the State.[1]

Under S. 79 of the Civil Procedure Code, as it originally stood, suits by or against the Government were required to be instituted by or against the Secretary of State for India in Council.[2] But, after the passing of the Government of India Act, 1935, the authority to be named as plaintiff or defendant in a suit by or against the Central Government was the Governor-General in Council before the establishment of the Federation of India and thereafter, the Federation. In the case of a suit by or against a Provincial Government the authority to be named as plaintiff or defendant was the Province. In the case of a suit by or against the Crown Representative, the authority to be named as plaintiff or defendant was the Secretary of State.

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[2] 1952 Assam 159 (166) [AIR V 39] : ILR (1952) 4 Assam 275 (DB), *Union of India* v. *Mohimchandra*.

[3] 1941 F C 16 (28) [AIR V 28] (F C), *United Provinces* v. *Mt Atiqa Begum*.

Article 300 — Note 11

[1] Under S. 32 of the Government of India Act of 1919 and S. 65 of the Government of India Act of 1858, a suit by or against the Secretary of State for India was required to be brought in the name of the Secretary of State for India in Council.

[2] *See* 1952 Cal 919 (921) (Pr 5) [AIR V 39] : ILR (1953) 1 Cal 355 : 1953 Cri L Jour 136 (DB), *Tarafatullah* v. *S. N. Maitra*. (Per Chakravartti J. : When Union of India or a State is sought to be made a party, it is to be impleaded in the manner and in the name indicated in the Constitution itself. To implead the Union, or one of the States *as represented by some particular officer*, whether in civil or criminal proceedings, is not warranted by any provision of law, and so far as criminal proceedings are concerned, is particularly inappropriate.)

12. Misdescription of parties. — A mere misdescription of parties can be corrected by the Court at any time.[1] This principle applies also to suits by or against the Government.[2]

13. Suits involving question of law as to interpretation of the Constitution.—In *United Provinces* v. *Mt. Atiqa Begam,*[1] a question arose whether, during the hearing of an appeal in which the constitutional validity of an Act of a Provincial Legislature was impugned, the High Court had the power to make the Province a party under the provisions of the Code of Civil Procedure, 1908. While the Federal Court answered this question in the affirmative, the Chief Justice expressed certain doubts and suggested that the matter might well engage the attention of the Central Legislature. The Code of Civil Procedure (Amendment) Act, 1942 by inserting a new Order 27A in the First Schedule of the Civil Procedure Code now makes provision for cases like the one referred to above.

Rule 1 of Order 27A requires that where a substantial question of constitutional law is involved in a case, notice must be given to the Attorney-General for India if the question of law concerns the Central Government, and to the Advocate-General of the State, if the question of law concerns a State Government. Rule 2 of the Order provides for the impleadment as a party in such cases of the Central Government or the State Government on the application of the Attorney-General or the Advocate-General of the State, as the case may be.

14. Intervention by Attorney-General or Advocate-General.—Order 41 of the Supreme Court Rules runs as follows :

> "**R. 1.** The Court may direct notice of any proceedings to be given to the Attorney-General for India or to the Advocate-General of any State, and the Attorney-General for India or the

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Article 300 — Note 12

[1] 1941 F C 16 (20, 21, 22) [AIR V 28] (FC), *United Provinces* v. *Mt. Atiqa Begum.*

See AIR Commentary on Civil Procedure Code, O. 1 R. 10 Note 37.

[2] 1939 Lah 533 (585) [AIR V 26], *Amar Kaur* v. *Secretary of State.* (Where in a suit against the Secretary of State, the latter is wrongly described as 'Secretary of State for India in Council,' instead of merely as "Secretary of State for India," this is a mere misdescription which can be amended at any time by omitting the words "for India in Council".)

1939 Lah 298 (298) [AIR V 26], *Samundar Khan* v. *Secretary of State.*

See also AIR Commentary on Civil Procedure Code, S. 79 Note 8.

Article 300 — Note 13

[1] 1941 F C 16 (23) [AIR V 28] (FC).

Advocate-General to whom such notice is given may appear and take such part in the proceedings as he may be advised.

"**R. 2.** The Attorney-General for India or the Advocate-General of any State may apply to be heard in any proceedings before the Court, and the Court may, if in its opinion the justice of the case so requires, permit the Attorney-General for India or the Advocate-General so applying to appear and be heard, subject to such terms as to costs or otherwise as the Court may think fit.'

See also NOTE 13 above.

15. Writ proceedings.—This article does not control ART. 226 which gives to the Court the power to issue to any person or authority including, in appropriate cases, any Government, directions, orders or writs, etc.[1]

In view of S. 79 of the Code of Civil Procedure and this article, a petition for a writ of mandamus against a particular officer cannot be interpreted as directed against the State Government.[2]

The Union of India can apply for a writ of certiorari under ART. 226.[3]

See also NOTE 10.

16. Contempt of Court. — Where an order of injunction is passed by a Court against a State Government, and such order is deliberately disobeyed by the State Government, proceedings for contempt may be taken against the State Government and the property of the State Government may be attached in such proceedings.[1] In such cases, contempt proceedings may be taken also against the particular officer who is responsible for the disobedience of the order of the Court, and in such proceedings the officer may be committed to prison for the contempt. But the proceedings must be specifically taken against the officer. There cannot be proceedings for committal of a State Government as represented by a particular officer.[2]

Article 300 — Note 15

1. 1953 Punj 137 (144, 145) [AIR V 40 C 53]: ILR (1953) Punj 472 (DB), *Naubat Rai* v. *Union of India.* (Observations of Mahajan J. in AIR 1950 S C 222 at p. 236 (SC), *Explained.*)

2. 1952 Him Pra 16 (17) (Pr 4) [AIR V 39 C 8], *Lalchand* v. *Collector of Sirmur* (Petition for writ of mandamus against Collector and Assistant Collector.)

3. 1955 Cal 581 (Pr 4) [A I R V 42 C 182], *Union of India* v. *Satyendra Nath.* (Particular writ which a body like the Union of India can ask for is of course limited to the very nature of things. It cannot for example, ask for a writ in the nature of Habeas Corpus and possibly not for writ of Quo Warranto. However it can ask for writ in nature of mandamus, prohibition or certiorari.)

Article 300 — Note 16

1. 1954 Pat 513 (522) (Prs 30, 31) [AIR V 41 C 174] : ILR 33 Pat 603 : 1954 Cri L Jour 1593 (DB), *State of Bihar* v. *Sonabati Kumari.*

2. 1952 Cal 919 (927) (Pr 29) [AIR V 39]: ILR (1953) 1 Cal 355 : 1953 Cri L Jour 136 (DB), *Tarafatullah* v. *S. N. Maitra.*

Where the Court issues an injunction to a person not to receive a certain sum of money from the Government, and notwithstanding such injunction the Government pays, and such person receives, the money, he would be guilty of contempt of Court though the Government is not bound by the injunction.[3]

17. Proceedings pending at commencement of Constitution—(Clause 2).—In the case of legal proceedings pending at the commencement of the Constitution (26th January 1950), to which the Central Government or Provincial Government is a party, cl. (2) provides that the Union of India or the corresponding State, as the case may be, shall be deemed as substituted. There was a similar provision in S. 179 (2) of the Government of India Act, 1935. Under cl. (2) of this article, as well as under S. 179 (2) of the Government of India Act, 1935, the substitution takes place automatically by operation of law, without any application or order.[1] Article 10 of the Indian Independence (Rights, Property and Liabilities) Order, 1947, dealt with, *inter alia*, the effect of the partition on pending legal proceedings.[2]

18. Part B States.—In the case of a suit against the Government of a State, which corresponds to what was an Indian State previous to the Constitution, the question whether a suit will lie in a given case will depend on whether, previous to the Constitution, a suit would have lain against the corresponding Indian State. This would naturally depend upon the law that was applicable to the particular Indian State. Thus, where there was an Act in an Indian State, which Act continues to be applicable in the corresponding Part B State after the commencement of the Constitution, and under this Act a party could have maintained a suit against the Government of the Indian State, a similar suit may also be brought against the Part B State, after the coming into force of the Constitution.[1]

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[3] 1915 P C 106 (2) (109) [AIR V 2] (P C), *Eastern Trust Co.* v. *Mackenzie Mann & Co. Ltd.*

Article 300 — Note 17

[1] 1944 Cal 315 (317) [AIR V 31] (DB), *Brojendra Kishore* v. *Governor-General in Council.*

[2] *See* 1951 S C 23 (25) [AIR V 38 C 8] : ILR (1951) Hyd 372 : ILR (1952) 1 Cal 119 : 1952 S C R 1 (SC), *State of Tripura* v. *Province of East Bengal.* (Suit for injunction restraining proceedings for levy of agricultural income-tax, on the ground that the Bengal Agricultural Income-tax Act was *ultra vires*—Suit filed in the Province of Bengal—*Held*, under the circumstances of the case, the liability became transferred, after partition, to the Province of East Bengal in Pakistan, and the suit could be continued against East Bengal.)

Article 300 — Note 18

[1] 1954 S C 680 (683) (Pr 15) [A I R V 41 C 155] (S C), *Bholanath J. Thaker* v. *State of Saurashtra.* (Act of Wadhawan State fixing superannuation age for State Civil Servants at 60 years—Wadhawan State joining in the United States of Saurashtra—Civil Servant of Wadhawan cannot be retired before 60.)

19. Personal exemption of President, Governor and Rajpramukh. — Under ART. 361, the President, the Governor and the Rajpramukh of a State are granted immunity from legal liability for their official acts, and they are not answerable to any Court for such acts. There was a similar provision in the Government of India Act, 1935, S. 306, granting personal immunity to the Governor-General and the Governor of a Province. But these provisions do not imply that the Central Government or the State Government, as such, is exempt from legal proceedings. The exemption granted is purely a personal exemption.[1]

20. State as juristic person.—This article clearly implies and recognizes the legal personality of the Union of India and the States.[1] See also ART. 14, NOTE 11 and ART. 19, NOTE 79.

21. Crown when bound by statute.—Under English law, it is an established rule of construction that, the Crown is not bound by statute unless expressly named or is bound by necessary implication.[1] This principle has also been applied in India.[2] But in *Bell* v. *Municipal*

Article 300 — Note 19

1. 1950 S C 222 (236, 248) [A I R V 37 C 18] : 1950 S C R 621 (SC), *Province of Bombay* v. *Khushaldas.*

1943 Lah 41 (47) [AIR V 30] (FB), *Lahore Electric Supply Co. Ltd.* v. *Province of Punjab.* (Case under Government of India Act.)

Article 300 — Note 20

1. 1955 Cal 282 (284) (Pr 4) [(S) AIR V 42 C 78] : 1955 Cri L Jour 792, *Calcutta Corporation* v. *Director of Rationing.*

1952 Assam 159 (166) [A I R V 39] : I L R (1952) 4 Assam 275 (D B), *Union of India* v. *Mahim Chandra.*

1951 All 257 (306) (Pr 248) [A I R V 38 C 51] : I L R (1951) 1 All 269 (FB), *Moti Lal* v. *Uttar Pradesh Government.*

Article 300 — Note 21

1. 1951 Mad 880 (881) [A I R V 38 C 308] (D B), *In re Commissioner for Workmen's Compensation.*

(1948) 2 All E R 432 (433) : (1949) 1 K B 35, *London County Territorial & Auxiliary Forces Association* v. *Nichols.*

(1904) 2 K B 164 (171) : 73 L J K B 113, *Cooper* v. *Hawkins.*

(1902) 2 K B 73 (79, 80) : 71 L J K B 479, *Hornsey Urban Council* v. *Hennell.*

(1889) 24 Q B D 181 (184, 185) : 59 L J M C 51, *R.* v. *Kent Justices.*

(1879) 10 Ch D 595 (601, 603) : 48 L J Bcy 84, *In re Bonham, Ex parte Postmaster-General.*

(1865) 11 E R 1405 (1413, 1419) : 13 W R (Eng) 1069, *Mercy Docks* v. *Cameron.*

(1859) 120 E R 1034 (1035) : 7 W R (Eng) 206, *Moore* v. *Smith.*

(1601) 77 E R 69 (71) : 5 Co Rep 14 (15b), *Case of Ecclesiastical Persons.*

2. 1947 P C 34 (35) (Pr 6) [A I R V 34 C 7] : 73 Ind App 271 : I L R (1947) Kar (P C) 60 : I L R (1947) Bom 186 (P C), *Province of Bombay* v. *Municipal Corporation of the City of Bombay.*

1934 Bom 379 (380, 383) [AIR V 21] (DB), *Hiranand* v. *Secretary of State.*

('90) I L R 14 Bom 213 (218) (DB), *Secretary of State* v. *Mathurabhai.*

Commissioners for the City of Madras[3] it was held that according to the uniform course of Indian legislation, statutes imposing duties or taxes bind Government unless the very nature of duty or tax is such as to be inapplicable to Government. Following this decision, it was held by the Calcutta High Court in the undermentioned case[4] that in India the State or the Government would be bound by the statute unless exempted expressly or by necessary implication.

22. **Royal prerogative.**—The English law recognizes a distinction between acts done under the Royal Prerogative and those which constitute an Act of State. In *Union of India* v. *Ram Kamal*,[1] Ram Labhaya, Acting Chief Justice, summed up the position under the English law as follows :

> "Briefly stated the position in England, as gleaned from quotations from the treatises referred to above, is that all acts of sovereign authority, not authorised by statute, whether against foreigners or against its own subjects, are of the same nature. They are acts in the exercise of sovereign authority. When these acts affect foreign states or foreigners, they are not justiciable. Municipal Courts have no jurisdiction to question or examine their validity. In England the expression 'Act of State' signifies every act coming under this category. Acts of the sovereign authority against its subjects in times of war, rebellion or any other emergency of a like nature, not done under the sanction of the municipal statute, are acts deemed to have been done in the exercise of the prerogative. The view that holds the field is that these acts enjoy limited immunity. The Courts should not decline jurisdiction on the ground that the plea of prerogative is raised.

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[3] ('02) I L R 25 Mad 457 (466, 467) (DB). (Timber brought into Madras by or on behalf of Government is liable to the duty imposed by section 341 of the City of Madras Municipal Act, 1883, although Government is not named in the section.)

[4] 1955 Cal 282 (Prs 15, 20) [(S) AIR V 42 C 78] : 1955 Cri L Jour 792, *Calcutta Corporation* v. *Director of Rationing*. (The rule of construction by which the State is not held to be bound by a statute unless it is named in it expressly or by necessary implication is not a correct rule for this country. The course of Legislation in India clearly shows that the law even up to the coming into force of the Government of India Act, 1935, was that the Crown or the Government was bound by a statute unless it was exempted from its operation either expressly or by necessary implication. The Act of 1935 and the Constitution of India did not bring out any change in the law. (The Legislation in India relating to Prerogative Rights of Crown reviewed.) ('02) I L R 25 Mad 457, *Foll.*; A I R 1950 Cal 417, *Distinguished—Held*, that the State represented by the official was liable to pay the licence fee under S. 386 (1) (a), Calcutta Municipal Act.)

Article 300 — Note 22

[1] 1953 Assam 116 (124) [AIR V 40 C 53] (DB).

They should examine the necessity and the reasonableness of the act in the absence of an Act of Indemnity."

There is obviously no question of Royal Prerogative in a republic. But even under the Indian law, acts done under the sovereign authority of the State, though affecting the rights of the subjects of the State and not of foreigners, would, in times of war and insurrection, be immune from being questioned in a court of law, although the mere raising of the plea of such emergency would not be sufficient, but it would be necessary to prove it as a matter of fact, unless an Act of Indemnity has been passed. See also NOTE 3 (l) and (t).

23. Emergency legislation and sovereign authority. — When a Government assumes special powers because of a state of emergency and agrees to certain conditions under which those powers would be exercised, there would be no justification for pleading exemption from liability on the ground that the act, though possible under the emergency legislation, could also be done under the exercise of sovereign powers. Where, therefore, the situation is such that an act could be done both under the emergency laws and also in the exercise of the sovereign powers of the State, it should be done in the manner provided by the statute, which, though temporary in duration, becomes part of the municipal law of the land. If Government takes over property without requisitioning it as provided in the law made by itself, the subject cannot be deprived of his right to claim compensation in courts of law as provided by the law on the ground that the impugned act is an Act of State.[1]

24. Duty of Executive to obey the law. — The Executive can only act in pursuance of the powers given to it by the law.[1] In accordance with the British jurisprudence, no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice and it is the tradition of British justice that Judges should not shrink from deciding such issues in the face of the Executive.[2] In *Eastern Trust Company* v. *Mackenzie Mann and Company Limited*,[3] the Privy Council observed as follows:

"The non-existence of any right to bring the Crown into

Article 300 — Note 23

1. 1953 Assam 116 (126) (Pr 61) [AIR V 40 C 53] (DB), *Union of India* v. *Ram Kamal*. (*Attorney-General* v. *De Keyser's Royal Hotel*, (1920) App Cas 508, *Followed*.)

Article 300 — Note 24

1. 1931 P C 248 (252) [A I R V 18] (P C), *Eshugbayi Eleko* v. *Officer Administering Government of Nigeria*.

2. 1931 P C 248 (252) [A I R V 18] (P C), *Eshugbayi Eleko* v. *Officer Administering Government of Nigeria*.

3. 1915 P C 106 (109, 110) [A I R V 2] (PC).

Court, such as exists in England by Petition of Right, and in many of the colonies by the appointment of an officer to sue and be sued on behalf of the Crown, does not give the Crown immunity from all law, or authorise the interference by the Crown with private rights at its own mere will.........It is the duty of the Crown and of every branch of the executive to abide by and obey the law. If there is any difficulty in ascertaining it, the Courts are open to the Crown to sue, and it is the duty of the Executive, in cases of doubts, to ascertain the law, in order to obey it, not to disregard it."

In *Deare* v. *Attorney-General*[4] Lord Abinger, Chief Baron, observed as follows :

> "It has been the practice, which, I hope, never will be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a court of justice where any real point of difficulty that requires judicial decision has occurred."

See also ART. 226, NOTE 60.

25. Suit against State Railway. — The State in India claims no exemption from liability to be sued in its own Courts, when the cause of action arises either in contract or tort against a State Railway.[1]

26. Suit against Municipality. — Municipalities in India do not act in the exercise of sovereign powers or as agents of the State in laying or maintaining roads. Hence, even assuming that the State is not liable to be sued in regard to acts done in the exercise of what may be called sovereign powers, the Municipality is liable for injuries resulting to members of the public through negligent or improper performance of duty of maintaining in good repair public street in municipality.[1]

27. Suits against corporations. — A corporation is a juristic person and, subject to the statute of incorporation, can sue and be sued in a court of law. It can be made vicariously liable for the torts committed by its servants or agents in the course of their employment.[1] See also NOTE 26.

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[4] (1835) 160 E R 80 (85) : 41 R R 237.

Article 300 — Note 25

[1] 1953 Cal 1 (10) [AIR V 40 C 1], *Calcutta Motorcycle Co.* v. *Union of India.*

Article 300 — Note 26

[1] 1918 Mad 264 (2) (267) [A I R V 5] (D B), *Municipal Council* v. *Foster.* (Plaintiff injured by gravel deposited on road—Municipality liable—Municipality cannot shift liability to contractor—AIR 1915 Mad 993, *Distinguished.*)

Article 300 — Note 27

[1] (1866) 11 E R 1500 (1507) : 35 L J Ex 225, *Mersey Docks etc.* v. *Gibbs.* (Corporation is liable for negligence of its servants.)

28. Liability of high officers of State for acts of subordinates.— There is immunity of public servants for acts done by their official subordinates unless a special mandate or an adoption of the act, purporting to be done on their behalf, is proved.[1] Thus, the Postmaster-General in England is not liable, in his official capacity as head of the telegraph department of the post office, for wrongful acts done by his subordinates in carrying on the business of the Department. The latter is not in the employment of the Postmaster-General. He is a subordinate officer of the Crown and, therefore, the *nexus* between the Postmaster-General and the subordinate is broken.[2]

29. Personal liability of public officers. — An officer appointed by Government is not liable to be sued upon contracts made by him in that capacity.[1] See also ART. 299 (2).

30. Suit for damages against Government by dismissed Government servant for wrongful dismissal. — See ART. 310 and notes thereon.

31. Notice. — Under S. 80, Civil Procedure Code, no suit shall be instituted against the Government unless a notice, as required by that section, is given. This section is not *ultra vires* as contravening the constitutional right of bringing a suit against the Government whenever there is a cause of action for such suit, as it only regulates the procedure with regard to such suit and does not affect the substantive right.[1]

32. Local jurisdiction of Courts. — For the purpose of determining the local jurisdiction of a Court in a suit against the Government of India, the Government cannot be treated as having its seat throughout India, but must be deemed to be located only in New Delhi.[1]

Article 300 — Note 28

[1] (1906) 1 K B 178 (192) : 75 L J K B 366, *Bainbridge* v. *Post-master General.* See also cases cited in *P. and O. S. N. Company* v. *Secretary of State for India,* 5 Bom H C R App 1 (10).

[2] (1906) 1 K B 178 (191, 192) : 75 L J K B 366, *Bainbridge* v. *Post-Master General.*

Article 300 — Note 29

[1] (1786) 99 E R 1036 (1040) : 1 R R 177, *Macbeath* v. *Haldimand.*

Article 300 — Note 31

[1] 1927 P C 176 (185) [A I R V 14] (P C), *Bhagchand* v. *Secretary of State.* (Suggestion that S. 80, Civil P. C., is *ultra vires* arises from a misapprehension of ('13) ILR 40 Cal 391 (PC).)

Article 300 — Note 32

[1] 1955 All 468 (472) [(S) A I R V 42 C 134] (D B), *Ram Kirpal* v. *Union of India.* (*Held*, that the High Court of Allahabad could not issue any writ or direction to the Government or to the Union of India. AIR 1953 All 477 (FB), *held* impliedly overruled by AIR 1953 SC 210 (SC).)

1953 Cal 1 (Prs 3, 48, 52) [A I R V 40 C 1], *Calcutta Motorcycle Co.* v. *Union of India.* (Letters Patent (Cal), Cl. 12—"Carry on business"—State carrying

33. Suits by or against foreign States.—Under S. 84 of the Civil Procedure Code, a foreign State may sue in any Court in any State. The section reads as follows:

> "84. A foreign State may sue in any competent Court:
>
> Provided, that the object of the suit is to enforce a private right vested in the Ruler of such State or in any officer of such foreign State in his public capacity."

One of the cardinal principles of International Law is that every foreign State respects the independence of every other foreign State and as a consequence of this absolute independence and of the international comity which underlies the relations between the sovereign States, each State declines to exercise, by means of any of its Courts, jurisdiction over the person of any sovereign or ambassador or the public property of any State. A sovereign State cannot be sued in the Courts of a foreign State unless it voluntarily submits to the jurisdiction of the Courts concerned.[1] Section 86 of the Civil Procedure Code, however, provides that any Ruler of a foreign State or any ambassador or envoy of a foreign State may be sued in any competent Court with the consent of the Central Government.

See AIR Commentary on Civil Procedure Code, S. 86.

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on commercial undertaking like railway cannot be said to "carry on business" —Calcutta High Court has no jurisdiction to entertain suit against Union of India for damages on account of short delivery by State Railway where cause of action has arisen wholly outside the ordinary original civil jurisdiction of the High Court.)

Article 300 — Note 33

[1] 1951 Mad 880 (881) (Prs 4, 5) [A I R V 38 C 308] (DB), *In re Commissioner for Workmen's Compensation, Madras.* (A workman employed by the British Admiralty Civil Engineer, to unload girders brought in India received an injury in the course of his employment on 25-6-1946. He filed an application on 16-12-1946 under the Workmen's Compensation Act for determination of the amount of compensation payable to him—*Held* that (i) as the claim was against the Crown in the right of the United Kingdom as distinguished from the Crown in the right of Federation of India or a Provincial Government the application was not maintainable under the Workmen's Compensation Act on the date it was filed inasmuch as the Crown in the right of the United Kingdom was not bound by the Act—(ii) Even after the Constitution came into force on 26-1-1950 when India became a Sovereign Republic, any claim against the British Admiralty will be really a claim against the British Crown which is a foreign Sovereign entitled to immunity from the jurisdiction of Courts and tribunals of the Indian Republic and therefore the claim could not be proceeded with.)

TABLE OF CASES
FOR
CONSTITUTION OF INDIA
VOLUME III

NOTE : (1) The first number in a column stands for the page of the Report and the last number, for the Point Number.

(2) In the case of Notes of Unreported Cases of A. I. R. the first number indicates the number of the case and not the number of page.

(3) This table of cases is arranged in the following order :

I. The All India Reporter.
II. Notes of Unreported Cases of A. I. R.
III. Official Law Reports.
IV. Criminal Law Journal.
V. Other Journals.
VI. Unreported Decisions.
VII. Nominal Table of Foreign Cases.

A=Article; N=Note; Pre=Preamble; Pt=Point.

I. THE ALL INDIA REPORTER

	AIR PRIVY COUNCIL	
	1914 P C	
174	A 246 N 6	2
"	A 246 N 8	7
"	A 246 N 8	10
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"	A 246 N 9	3
"	A 246 N 9	16
"	A 246 N 13	11
	1915 P C	
106	A 245 N 7	4
"	A 300 N 16	3
"	A 300 N 24	3
	1919 P C	
145	A 245 N 8	23
"	A 245 N 8	89
	1920 P C	
202	A 246 N 8	23
	1921 P C	
148	A 246 N 6	2
"	A 246 N 6	7
"	A 246 N 8	12
"	A 246 N 8	16
"	A 246 N 8	23
"	A 246 N 9	3
	1921 P C *(con.)*	
148*con*	A 246 N 11	5
"	A 246 N 13	11
	1927 P C	
176	A 300 N 31	1
242	A 245 N 12	11
"	A 245 N 12	12
	1930 P C	
10	A 286 N 21	1
120	A 246 N 12	1
	1931 P C	
94	A 246 N 8	12
"	A 246 N 11	4
"	A 246 N 11	17
"	A 246 N 11	18
248	A 265 N 5	3
"	A 300 N 3	68
"	A 300 N 3	167
"	A 300 N 24	1
"	A 300 N 24	2
	1933 P C	
16	A 245 N 3	6
"	A 245 N 9	20
"	A 245 N 15	4
"	A 245 N 15	9
"	A 245 N 15	14
"	A 245 N 15	28
"	A 245 N 16	15
"	A 246 N 12	1
"	A 246 N 12	2
"	A 246 N 12	4
	1934 P C	
45	A 245 N 6	12
"	A 245 N 6	15
	1935 P C	
158	A 245 N 3	6
	1937 P C	
1	A 300 N 3	105
31	A 300 N 2	2
"	A 300 N 3	3
"	A 300 N 3	102
"	A 300 N 3	123
"	A 300 N 3	135
"	A 300 N 3	154
"	A 300 N 3	159
"	A 300 N 4	1
"	A 300 N 9	5
89	A 246 N 9	3
"	A 246 N 11	20
91	A 246 N 11	4
	1939 P C	
36	A 245 N 8	104
"	A 265 N 4	13
53	A 245 N 16	11
"	A 245 N 16	18
"	A 246 N 6	2
"	A 246 N 8	6
"	A 246 N 8	9
"	A 246 N 8	12
"	A 246 N 8	13
"	A 246 N 8	16
"	A 246 N 8	20
"	A 246 N 9	18
	1939 P C *(con.)*	
53*con*	A 246 N 9	19
"	A 246 N 9	20
"	A 246 N 11	5
	1940 P C	
60	A 246 N 9	3
105	A 300 N 9	4
	1943 P C	
76	A 245 N 16	11
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"	A 246 N 6	2
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	1944 P C	
7	A 245 N 13	7
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"	A 246 N 15	10
	1945 P C	
48	A 245 N 8	48
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"	A 245 N 10	24
"	A 245 N 10	25
"	A 245 N 10	28
"	A 245 N 16	11
98	A 246 N 6	1
"	A 246 N 6	4
"	A 246 N 6	5

1945 P C *(con.)*
98*con* A246N8 1
" A246N8 2
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" A246N8 21
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" A246N9 3
" A246N11 4
" A246N14 5
" A248N2 9
" A286N18 4

1946 P C
66 A245N16 19
" A286N18 20
83 A249N1 3
127 A246N15 13
" A294N8 1
169 A245N6 14
180 A245N15 4

1947 P C
34 A300N21 2
" A285N1 2
44 A246N8 6
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60 A246N6 1
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72 A248N2 7
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" A254N15 6
" A254N15 83
78 A286N20 14
" A286N20 16
" A300N9 4

1948 P C
102 A286N20 15

1948 P C *(con.)*
118 A245N15 3
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" A245N16 15
" A246N12 1
" A286N2 12
" A286N3 10
" A286N3 11
" A286N3 112
" A286N18 10
121 A300N3 120
" A300N3 126
" A300N3 128
" A300N3 129
" A300N3 135
" A300N3 154
" A300N3 160
" A300N4 1

1949 P C
121 A254N1 5
190 A245N16 19
" A245N16 24
" A246N8 23
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" A246N8 32
" A246N9 3
" A246N10 1
" A246N11 5
" A246N11 6

AIR FEDERAL COURT

1939 F C
1 A245N16 11
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" A246N6 1
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74 A245N16 19
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" A254N12 54
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1939 F C *(con.)*
74*con* A254N12 57
" A254N15 1
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" A254N21 1

1941 F C
16 A245N11 15
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" A300N13 1
42 A246N8 30
47 A245S16 19
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72 A245N16 22
" A245N16 23

1942 F C
8 A246N15 12
14 A246N9 29
" A246N14 4
17 A245N16 16
" A246N7 13
" A246N14 4

1942 F C *(con.)*
17*con* A246N15 7
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" A286N21 3
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1943 F C
11 A246N8 20
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13 A294N2 1
29 A245N16 11
36 A245N3 1

1944 F C
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18 A246N9 3
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25 A258N1 2
41 A300N3 138
51 A245N15 3
" A245N15 23
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62 A245N13 7
73 A248N2 2
86 A245N6 3
" A245N6 8

1945 F C
1 A254N15 83
2 A246N9 3
9 A245N15 3
" A245N15 23
" A246N12 1
25 A245N16 22
" A246N1 1

1946 F C
27 A245N15 4

1947 F C
1 A245N15 7
" A246N7 7
" A246N7 8
2 A248N2 10
" A248N2 11
32 A245N9 43

1947 F C *(con.)*

32*con*	A 265 N 5	16
38	A 249 N 8	9
"	A 299 N 8	13

1949 F C

18	A 245 N 15	4
"	A 245 N 15	23
31	A 246 N 8	16
"	A 246 N 8	17
"	A 246 N 9	3
"	A 254 N 12	46
"	A 254 N 15	12
"	A 254 N 15	91
"	A 254 N 16	1
121	A 285 N 3	1,2,3,4,5
"	A 285 N 9	2
143	A 294 N 3	1
175	A 245 N 8	57
"	A 245 N 9	43
"	A 245 N 10	34
"	A 245 N 10	37
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"	A 245 N 10	45

1950 F C

59	A 245 N 16	11
"	A 246 N 9	3
"	A 254 N 12	6
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"	A 254 N 12	10
"	A 254 N 12	12
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"	A 254 N 15	12
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"	A 254 N 15	90
67	A 245 N 16	10
"	A 246 N 7	5
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"	A 246 N 9	35
"	A 246 N 9	38
69	A 246 N 8	31
"	A 246 N 9	3

A I R SUPREME COURT

1950 S C

11	A 246 N 8	25
"	A 246 N 8	26
"	A 246 N 16	7
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27	A 245 N 8	102
"	A 245 N 8	103
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"	A 245 N 12	4
"	A 245 N 13	3
"	A 245 N 13	4
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"	A 245 N 16	2
"	A 245 N 16	11
"	A 246 N 15	22
124	A 245 N 16	25
"	A 286 N 18	21
222	A 300 N 2	1
"	A 300 N 3	2
"	A 300 N 3	5
"	A 300 N 3	12
"	A 300 N 3	35
"	A 300 N 3	51

1950 S C *(con.)*

222*con*	A 300 N 3	83
"	A 300 N 3	164
"	A 300 N 5	19
"	A 300 N 10	1
"	A 300 N 19	1

1951 S C

23	A 294 N 3	1
"	A 300 N 8	1
"	A 300 N 8	2
"	A 300 N 17	2
69	A 245 N 10	21
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"	A 246 N 14	11
"	A 246 N 16	9
97	A 265 N 1	1
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"	A 265 N 10	1
"	A 265 N 10	2
118	A 245 N 16	25
124	A 261 N 4	14
128	A 254 N 17	2
"	A 254 N 17	16
"	A 261 N 4	14
318	A 245 N 10	28
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332	A 245 N 3	1
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"	A 245 N 4	11

1951 S C *(con.)*

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1951 S C *(con.)*

332*con*	A 245 N 8	92
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"	A 245 N 11	9
"	A 245 N 16	15
"	A 246 N 12	9
"	A 246 N 21	1
484	A 245 N 10	41

1952 S C

12	A 299 N 8	2
16	A 286 N 20	12
"	A 286 N 20	17
115	A 265 N 6	11
"	A 265 N 6	13
"	A 265 N 6	14
"	A 286 N 20	1
123	A 245 N 8	24
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181	A 299 N 8	10
196	A 245 N 16	17
252	A 245 N 11	9
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366	A 286 N 1	3
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"	A 286 N 22	3
369	A 254 N 12	3

1953 S C

58	A 246 N 9	3
83	A 246 N 7	1
"	A 246 N 9	3
"	A 254 N 15	90
210	A 299 N 8	2
215	A 245 N 6	11
244	A 246 N 15	14
250	A 299 N 15	4

1953 S C (*con.*)

252	A 245 N 15	9
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"	A 286 N 3	107

1953 S C (*con.*)

252*con*	A 286 N 8	109
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"	A 286 N 21	8
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274	A 245 N 15	9
"	A 286 N 2	13
"	A 286 N 3	9
"	A 286 N 3	12
"	A 286 N 3	13
"	A 286 N 3	126
"	A 286 N 3	127
"	A 286 N 3	130
"	A 286 N 3	131
"	A 286 N 3	132
"	A 286 N 3	135
"	A 286 N 3	137
"	A 286 N 3	138
"	A 286 N 3	142
"	A 286 N 5	10
"	A 286 N 7	2
"	A 286 N 15	1
"	A 286 N 18	9
"	A 286 N 18	10
333	A 286 N 1	1
"	A 286 N 2	2
"	A 286 N 2	8
"	A 286 N 2	9
"	A 286 N 2	15
"	A 286 N 2	16
"	A 286 N 3	16
"	A 286 N 3	18

1953 S C (*con.*)

333*con*	A 286 N 3	42
"	A 286 N 3	58
"	A 286 N 3	67
"	A 286 N 3	75
"	A 286 N 3	114
"	A 286 N 7	4
"	A 286 N 7	5
"	A 246 N 8	7
"	A 286 N 9	6
"	A 286 N 9	8
"	A 286 N 11	1
"	A 286 N 11	5
"	A 286 N 11	6
"	A 286 N 11	7
"	A 286 N 11	9
"	A 286 A 13	1
"	A 286 N 13	2
"	A 286 N 13	3
"	A 286 N 13	10
"	A 286 N 13	11
"	A 286 N 13	14
"	A 286 N 13	17
"	A 286 N 13	19
"	A 286 N 13	20
"	A 286 N 13	23
"	A 286 N 13	25
"	A 286 N 13	27
"	A 286 N 13	34
"	A 286 N 13	38
"	A 286 N 13	39
"	A 286 N 13	41
"	A 286 N 13	44
"	A 286 N 14	3
"	A 286 N 14	6
"	A 286 N 14	7
"	A 286 N 14	8
"	A 286 N 14	9
"	A 286 N 14	10
"	A 286 N 14	11
"	A 286 N 14	12
"	A 286 N 14	18
"	A 286 N 15	2
"	A 286 N 18	22
"	A 286 N 18	26
"	A 286 N 22	4
"	A 286 N 22	6
"	A 245 N 11	19
375	A 246 N 11	1
"	A 246 N 11	2
"	A 246 N 11	3
"	A 246 N 11	4
"	A 246 N 11	5
"	A 246 N 11	6
"	A 346 N 11	9
"	A 246 N 11	10
"	A 246 N 11	12
"	A 246 N 11	13
"	A 286 N 17	6
384	A 265 N 7	6

1954 S C

119	A 245 N 13	3
"	A 246 N 11	4
"	A 246 N 11	8a
158	A 245 N 12	1
"	A 245 N 12	2
"	A 245 N 12	3
"	A 245 N 12	7
163	A 277 N 5	1
165	A 299 N 6	1
"	A 299 N 6	10

1954 S C (*con.*)
165*con* A299N8 22
224 A299N11 4
236 A299N8 2
" A299N8 6
" A299N8 8
" A299N8 11
" A299N8 12
" A299N8 15
" A299N8 16
" A299N8 18
" A299N8 19
" A299N9 2
" A299N9 3
" A299N9 4
" A299N9 5
" A299N9 6
" A299N11 1
" A299N11 3
" A299N17 2
245 A300N1 2
" A300N3 24
" A300N3 132
" A300N3 138
" A300N3 154
" A300N3 158
" A300N4 1
" A300N5 2
251 A246N8 9
" A246N9 1
" A246N14 1
" A246N16 14
" A248N2 3
" A248N2 10
" A298N3 1
282 A265N4 2
" A265N4 3
" A265N4 6
" A265N4 7
" A265N4 8
" A265N4 10
" A265N4 11
" A265N4 13
" A265N4 16
" A265N4 17
" A265N4 18
" A265N4 19
" A265N4 22
" A265N4 23
" A265N4 24
" A265N4 25
" A265N4 26
" A265N4 27
" A265N5 10
" A265N6 3
" A265N7 2
" A266N2 6
" A282N2 3
311 A265N6 11
" A286N17 2
" A286N17 4
" A286N17 5
" A286N17 6
" A286N17 8
" A286N17 9
" A286N20 2
314 A246N7 12
388 A264N4 8
" A26 N4 3
" A265N4 7
" A265N4 10
" A265N4 15

1954 S C (*con.*)
388*con* A265N4 28
" A266N2 5
" A266N2 6
400 A265N4 3
" A265N4 7
" A265N4 10
" A265N4 12
" A265N4 14
" A265N4 25
" A266N2 5
" A266N2 6
403 A265N6 6
" A265N6 11
" A286N15 5
" A286N18 23
" A286N20 1
" A286N20 2
" A286N20 4
" A286N20 5
" A286N20 8
" A286N20 9
" A286N20 10
" A286N20 17
459 A286N18 5
" A286N18 6
" A286N18 7
465 A245N8 50
" A245N8 85
" A245N8 89
" A245N8 104
" A245N9 2
" A245N9 12
" A245N9 44
" A245N9 47
" A245N9 48
" A245N9 49
" A245N9 50
" A245N11 1
" A245N11 9
" A245N11 21
" A285N8 84
545 A265N7 3
" A265N7 4
" A265N10 3
569 A245N8 41
" A245N8 59
" A245N8 60
" A245N8 62
" A245N8 80
" A245N8 84
" A245N8 87
" A245N8 89
" A245N9 3
" A245N9 43
" A245N10 19
680 A300N3 1
" A300N18 1
752 A254N2 4
" A254N2 6
" A254N2 7
" A254N5 6
" A254N8 1
" A254N9 1
" A254N15 1
" A254N15 11
" A254N15 12
" A254N15 16
" A254N15 53
" A254N15 78

1954 S C (*con.*)
752*con* A254N15 79
" A254N15 90
" A254N15 74
" A254N17 11
" A254N17 14
" A254N17 15
" A254N20 1
" A254N20 4
" A254N22 4
" A254N22 5
936 A299N8 2

1955 S C
1 A265N5 16
" A265N10 6
3 A265N3 1
" A265N3 2
" A265N3 3
" A265N6 1
" A265N7 5
" A265N10 1
" A265N10 5
13 A265N7 3
" A265N7 4
" A265N10 4
25 A245N9 6
" A245N9 15
" A245N9 17
" A245N9 18
" A245N10 29
" A245N10 31
58 A246N7 1
" A246N12 1
" A246N12 10
" A246N14 2
" A246N14 4
" A246N15
" A246N15 4
" A246N15 5
123 A245N13 4
" A245N16 2
" A245N16 3
" A245N16 4
" A245N16 5
" A245N16 26
" A245N16 27
" A245N16 28
" A245N16 30
" A245N16 32
240 A245N13 1
435 A245N11 18
468 A299N4 1
" A299N8 2
" A299N8 6
" A299N8 7
504 A246N7 1
" A246N8 23
" A246N9 1
" A246N9 2
" A246N9 37
540 A245N13 2
" A245N13 7
" A245N13 9
" A245N16 6
" A246N3a 1
" A246N5 3
" A294N4 1
" A294N7 1
" A294N7 2
" A294N8 1

1955 S C (*con.*)
549 A245N4 14
" A245N5 1a
" A266N3 1
" A266N3 7
" A289N3 1a
661 A245N15 4
" A245N15 9
" A245N16 25
" A261N2a 1
" A265N5 9
" A265N6 2
" A265N6 11
" A286N1 2
" A286N1 4
" A286N2 1
" A286N2 2
" A286N2 3
" A286N2 4
" A286N2 5
a A286N2 7
" A286N2 10
" A286N2 14
" A286N2 18
" A286N2 19
" A286N2a 1
" A286N3 2
" A286N3 3
" A286N3 5
" A286N3 6
" A286N3 7
" A286N3 19
" A286N3 22
" A286N3 24
" A286N3 26
" A286N3 28
" A286N3 31
" A286N3 33
" A286N3 34
" A286N3 36
" A286N3 37
" A286N3 38
" A286N3 40
" A286N3 43
" A286N3 44
" A286N3 45
" A286S3 46
" A286N3 49
" A286N3 59
" A286N3 63
" A286N3 64
" A286N3 65
" A286N3 69
" A286N3 71
" A286N3 72
" A286N3 77
" A286N3 80
" A286N3 81
" A286N3 82
" A286N3 85
" A286N3 86
" A286N3 87
" A286N3 88
" A286N3 90
" A286N3 91
" A286N3 97
" A286N3 99
" A286N3 102
" A286N3 104
" A286N3 106
" A286N3 108

1955 S C (*con.*)
661*con* A 286 N 3 109
„ A 286 N 3 111
„ A 286 N 3 113
„ A 286 N 3 116
„ A 286 N 3 119
„ A 286 N 3 120
„ A 286 N 3 122
„ A 286 N 3 124
„ A 286 N 3 129
„ A 286 N 3 134
„ A 286 N 3 139
„ A 286 N 3 151
„ A 286 N 4 2
„ A 286 N 4 4
„ A 286 N 5 3
„ A 286 N 5 4
„ A 286 N 5 7
„ A 286 N 7 3
„ A 286 N 7 6
„ A 286 N 8 4
„ A 286 N 8 5
„ A 286 N 10 1
„ A 286 N 11 13
„ A 286 N 12 7
„ A 286 N 15 7
„ A 286 N 15 9
„ A 286 N 18 12
„ A 286 N 18 14
„ A 286 N 18 16
„ A 286 N 18 24
„ A 286 N 18 25
„ A 286 N 18 26
„ A 286 N 20 1
„ A 286 N 20 2
„ A 286 N 20 4
„ A 286 N 20 5
„ A 286 N 20 6
„ A 286 N 20 7
„ A 286 N 20 9
„ A 286 N 20 11
„ A 286 N 20 17
„ A 286 N 20 20
„ A 286 N 21 8
„ A 286 N 21 10
765 A 286 N 2 3
„ A 286 N 3 109
„ A 286 N 5 1
„ A 286 N 10 2
„ A 286 N 10 3
„ A 286 N 10 4
„ A 286 N 12 8
„ A 286 N 12 9
„ A 286 N 18 27
786 A 286 N 11 14

1956 S C
20 A 245 N 16 13

AIR AJMER

1950 Ajmer
26 A 246 N 21 1

1953 Ajmer
65 A 245 N 10 31

AIR ALLAHABAD

1922 All
276 A 300 N 7 1
„ A 300 N 7 4

1932 All
575 A 300 N 5 22
„ A 300 N 7 1
„ A 300 N 7 3

1937 All
158 A 300 N 7 1
„ A 300 N 7 4

1940 All
272 A 245 N 12 10
„ A 246 N 9 1
„ A 246 N 15 9
„ A 254 N 5 3
„ A 254 N 12 3
„ A 254 N 12 32
„ A 254 N 12 43

1941 All
321 A 245 N 11 9
377 A 299 N 5 1
„ A 299 N 6 5
„ A 299 N 8 2

1942 All
156 A 245 N 16 33
„ A 246 N 9 3
„ A 246 N 14 2
„ A 246 N 14 4
„ A 246 N 19 1
„ A 265 N 4 1
„ A 265 N 4 13
„ A 265 N 4 32
„ A 265 N 5 8
„ A 265 N 6 13
„ A 265 N 7 2

1943 All
26 A 246 N 8 23

1948 All
369 A 246 N 9 3
382 A 276 N 2 1
„ A 276 N 2 2
„ A 276 N 3 1

1949 All
32 A 245 N 11 20
513 A 246 N 9 3
„ A 246 N 9 35
„ A 248 N 2 6

1950 All
206 A 300 N 2 4
„ A 300 N 2 5
„ A 300 N 3 2
„ A 300 N 5 12
„ A 300 N 5 21
„ A 300 N 5 22
423 A 258 N 1 1

1951 All
44 A 245 N 8 23
„ A 245 N 11 9
„ A 245 N 11 14
181 A 245 N 9 45
„ A 245 N 10 41
„ A 245 N 10 43
228 A 245 N 6 6
„ A 245 N 16 36
257 A 245 N 4 12
„ A 245 N 16 2
„ A 266 N 3 2
„ A 266 N 3 3
„ A 266 N 3 4
„ A 266 N 3 5
„ A 266 N 3 6
„ A 266 N 4 7
„ A 289 N 3 1a

1951 All (*con.*)
257*con* A 293 N 2 1
„ A 300 N 20 1
674 A 245 N 8 23
„ A 245 N 9 45
„ A 245 N 11 9
„ A 246 N 5 2
„ A 246 N 8 29
„ A 246 N 15 13
„ A 246 N 15 16
„ A 294 N 6 2
703 A 250 N 4 1
„ A 250 N 5 3
816 A 245 N 2 1
„ A 245 N 11 9

1952 All
88 A 245 N 11 9
„ A 246 N 7 4
„ A 246 N 7 9
„ A 246 N 14 4
„ A 246 N 14 5
„ A 246 N 15 16
„ A 246 N 16 12
„ A 254 N 21 1
624 A 245 N 8 101
699 A 245 N 8 101
746 A 245 N 16 12
866 A 245 N 8 31
„ A 245 N 8 50
„ A 245 N 8 89
„ A 245 N 8 99
„ A 245 N 8 105
„ A 245 N 9 47
„ A 245 N 9 48
„ A 245 N 11 9
„ A 245 N 11 21

1954 All
56 A 285 N 6 1
333 A 299 N 3 2
„ A 299 N 8 2
„ A 299 N 8 3
515 A 245 N 11 9
538 A 245 N 8 23
„ A 245 N 11 9
„ A 254 N 21 1
550 A 245 N 11 9
655 A 246 N 9 5
„ A 246 N 9 23
„ A 254 N 21 1
660 A 254 N 15 83
675 A 265 N 4 13
„ A 265 N 4 29
„ A 265 N 4 30
705 A 245 N 11 9
728 A 246 N 4 2
„ A 246 N 6 1a
„ A 246 N 8 16
„ A 246 N 8 17
„ A 246 N 8 21
„ A 246 N 8 23
„ A 246 N 9 1
„ A 246 N 11 4
„ A 246 N 11 6
„ A 246 N 14 2
„ A 246 N 15 2
„ A 246 N 22 1
„ A 246 N 22 2

1955 All
48 A 245 N 10 41
99 A 286 N 3 42
„ A 286 N 3 109

1955 All (*con.*)
99*con* A 286 N 10 3
„ A 286 N 15 3
„ A 286 N 15 4
„ A 286 N 15 5
„ A 286 N 15 6
193 A 245 N 16 2
„ A 245 N 16 19
„ A 245 N 16 24
468 A 300 N 22 1
554 A 245 N 9 50
„ A 245 N 9 51
„ A 245 N 10 19
653 A 245 N 11 1
„ A 245 N 11 9
„ A 286 N 3 2

AIR ANDHRA

1955 Andhra
181 A 254 N 15 90
248 A 286 N 3 2

AIR ASSAM

1952 Assam
69 A 245 N 10 41
76 A 299 N 2 2
„ A 299 N 8 21
141 A 300 N 3 34
„ A 300 N 3 163
159 A 245 N 12 8
„ A 300 N 3 23
„ A 300 N 9 1
„ A 300 N 10 2
„ A 300 N 20 1

1953 Assam
116 A 300 N 2 5
„ A 300 N 3 2
„ A 300 N 3 5
„ A 300 N 3 23
„ A 300 N 3 24
„ A 300 N 3 69
„ A 300 N 3 71
„ A 300 N 3 138
„ A 300 N 5 17
„ A 300 N 5 18
„ A 300 N 22 1
„ A 300 N 23 1
177 A 248 N 2 5

1954 Assam
161 A 246 N 15 15

1955 Assam
33 A 299 N 4 1
„ A 299 N 8 2
„ A 299 N 8 3
„ A 299 N 8 17
„ A 299 N 8 20
„ A 299 N 9 2
„ A 299 N 9 12
„ A 299 N 9 15
„ A 299 N 12 2
86 A 299 N 3 1
„ A 299 N 5 1
„ A 299 N 6 6
„ A 299 N 6 9
„ A 299 N 8 2
„ A 299 N 8 19
„ A 299 N 9 2
„ A 299 N 9 7

1955 Assam (con.)
86con A 299 N 9 11
,, A 299 N 9 12
,, A 299 N 9 13
113 A 286 N 9 42
,, A 286 N 3 118
,, A 286 N 3 143
249 A 245 N 16 11
,, A 246 N 7 1
,, A 246 N 8 16
,, A 246 N 8 28
,, A 246 N 9 3
,, A 246 N 15 2

1956 Assam
23 A 298 N 3 2
,, A 299 N 9 1
,, A 299 N 11 1

AIR BOMBAY

1915 Bom
227 A 300 N 3 40
,, A 300 N 7 1

1916 Bom
200 A 261 N 4 6

1934 Bom
277 A 299 N 6 1
,, A 300 N 3 40
,, A 300 N 3 69
,, A 300 N 3 138
379 A 285 N 1 2
,, A 300 N 21 2

1936 Bom
19 A 299 N 3 3
,, A 299 N 6 2
,, A 299 N 15 1

1937 Bom
449 A 299 N 6 1
,, A 299 N 8 2
,, A 299 N 15 1

1938 Bom
54 A 299 N 9 15
168 A 299 N 3 3
,, A 299 N 6 4

1940 Bom
65 A 246 N 9 3
,, A 246 N 12 1
,, A 276 N 2 1
307 A 246 N 6 1
,, A 246 N 8 17
,, A 246 N 13 16
362 A 245 N 15 8a

1943 Bom
169 A 245 N 10 24
427 A 300 N 3 67

1944 Bom
1 A 245 N 15 3
,, A 245 N 15 23
247 A 250 N 2 2

1945 Bom
352 A 254 N 21 1

1946 Bom
216 A 246 N 7 2
,, A 246 N 7 6
,, A 246 N 12 1
,, A 246 N 14 2
,, A 246 N 15 17
,, A 246 N 15 19
,, A 24 N 2 4
,, A 248 N 2 10

1948 Bom
87 A 245 N 15 3
,, A 245 N 15 4

1949 Bom
71 A 254 N 11 2
93 A 248 N 2 5
197 A 246 N 8 16
,, A 246 N 8 28
,, A 246 N 9 3
277 A 300 N 3 39
,, A 300 N 10 1

1950 Bom
101 A 254 N 1 1
221 A 245 N 16 19
,, A 246 N 8 16
,, A 246 N 9 3
,, A 246 N 12 1

1951 Bom
33 A 245 N 16 2
125 A 261 N 4 18
,, A 261 N 4 26
,, A 26 N 4 27
180 A 245 N 10 21
,, A 246 N 8 28
188 A 254 N 17 16
190 A 261 N 4 18
,, A 261 N 4 26
,, A 261 N 4 27
210 A 245 N 10 28
,, A 245 N 11 15
397 A 245 N 11 15
,, A 246 N 14 2
,, A 246 N 14 4
438 A 245 N 6 12
,, A 245 N 6 14
,, A 245 N 12 9

1952 Bom
16 A 245 N 10 41
,, A 245 N 16 16
,, A 245 N 16 17
,, A 246 N 8 30
,, A 254 N 6 3
261 A 24 N 16 19
,, A 246 N 8 23
,, A 246 N 8 28
,, A 246 N 12 1
,, A 246 N 14 4
,, A 246 N 15 11
,, A 246 N 15 19
296 A 245 N 16 11

1953 Bom
242 A 2 8 N 3 1
,, A 265 N 4 10
,, A 265 N 4 13
282 A 245 N 12 8
371 A 246 N 10 5
,, A 254 N 2 4a
,, A 254 N 15 65
,, A 254 N 15 72
,, A 254 N 21 4

1954 Bom
129 A 300 N 3 40
188 A 246 N 8 16
,, A 246 N 8 17
,, A 246 N 8 19
,, A 24 N 8 23
,, A 246 N 12 1
,, A 246 N 14 4
204 A 246 N 7 12
,, A 246 N 9 19

1954 Bom (con.)
204con A 246 N 9 3
,, A 246 N 14 2
,, A 246 N 14 4
254 A 246 N 8 17
261 A 245 N 3 6
,, A 245 N 10 10
,, A 245 N 11 1
,, A 245 N 11 8
,, A 245 N 11 20
,, A 265 N 7 2
,, A 265 N 9 1
,, A 276 N 3 1
397 A 245 N 9 4
,, A 245 N 9 39
,, A 245 N 11 9
508 A 246 N 9 3
,, A 246 N 15 4

1955 Bom
28 A 245 N 16 9
35 A 254 N 15 90
,, A 254 N 21 2
,, A 254 N 22 1
,, A 254 N 22 2
,, A 254 N 22 3
55 A 245 N 15 6
185 A 245 N 9 52
,, A 245 N 11 9
,, A 245 N 11 10
,, A 245 N 11 12
,, A 245 N 11 13
439 A 245 N 15 9
,, A 246 N 9 1

1956 Bom
1 A 245 N 15 6
,, A 245 N 15 9
,, A 245 N 16 1
,, A 245 N 16 16
,, A 246 N 7 3
,, A 246 N 9 1
,, A 276 N 3 1

AIR CALCUTTA

1921 Cal
708 A 254 N 9 4

1925 Cal
955 A 261 N 2 6

1928 Cal
74 A 299 N 5 1
,, A 299 N 8 2
,, A 299 N 8 4
,, A 299 N 8 20
,, A 300 N 3 23
,, A 300 N 5 19

1930 Cal
53 A 245 N 15 8a

1932 Cal
834 A 300 N 3 23
,, A 300 N 5 14

1934 Cal
128 A 300 N 5 7
,, A 300 N 5 21
,, A 300 N 7 1

1939 Cal
628 A 254 N 15 12
,, A 254 N 15 13
,, A 254 N 15 18
,, A 254 N 15 22
,, A 254 N 15 23
,, A 254 N 15 39

1939 Cal (con.)
628con A 254 N 15 46
,, A 254 N 15 47
,, A 254 N 15 49
,, A 254 N 15 52
,, A 254 N 15 55
,, A 254 N 15 62
,, A 254 N 15 73
,, A 254 N 15 80
,, A 254 N 15 82
,, A 254 N 15 83
,, A 254 N 15 87
,, A 254 N 15 90

1942 Cal
429 A 246 N 8 31
,, A 246 N 14 1
,, A 246 N 14 2
,, A 246 N 16 13
,, A 254 N 9 6
,, A 254 N 12 55
,, A 254 N 12 61
,, A 254 N 15 83
464 A 250 N 5 1
587 A 254 N 9 6
,, A 254 N 12 9
,, A 254 N 12 12
,, A 254 N 12 23
,, A 254 N 12 25
,, A 234 N 12 26
,, A 254 N 12 63
,, A 254 N 15 12
,, A 254 N 15 13
,, A 254 N 15 83
,, A 254 N 15 87

1943 Cal
285 A 245 N 10 24
377 A 250 N 3 1
,, A 250 N 4 1
,, A 250 N 5 2
,, A 254 N 17 11
,, A 254 N 17 12
,, A 254 N 17 14
489 A 246 N 11 6

1944 Cal
315 A 300 N 17 1

1946 Cal
48 A 254 N 12 7
,, A 254 N 12 9
,, A 254 N 12 55
,, A 254 N 15 83
197 A 245 N 11 1

1947 Cal
1 A 254 N 12 6
,, A 254 N 15 83
,, A 254 N 15 90

1948 Cal
116 A 285 N 1 1,2
,, A 285 N 3 2,4,5
,, A 285 N 9 1,2
322 A 245 N 15 8

1949 Cal
1 A 246 N 9 3
,, A 254 N 12 9
,, A 254 N 12 13
,, A 254 N 12 14
,, A 254 N 12 15
,, A 254 N 12 33
,, A 254 N 12 34
,, A 254 N 12 37
,, A 254 N 12 38
,, A 254 N 12 44

1949 Cal (con.)
1con A 254 N 12 50
312 A 285 N 8 4,5
" A 285 N 9 2
" A 298 N 5 2
1950 Cal
12 A 261 N 4 27
159 A 294 N 5 1
214 A 250 N 5 3
274 A 245 N 16 1
421 A 285 N 1 2
463 A 294 N 5 1
1951 Cal
120 A 245 N 9 49
" A 245 N 11 9
" A 249 N 2 1
346 A 246 N 9 3
" A 254 N 21 5
861 A 299 N 6 8
1952 Cal
140 A 294 N 3 1
306 A 299 N 8 2
" A 299 N 9 2
" A 299 N 9 11
" A 299 N 9 14
" A 299 N 10 2
443 A 299 N 13 1
" A 299 N 14 1
679 A 246 N 9 3
740 A 246 N 8 16
" A 246 N 9 3
919 A 300 N 11 2
" A 300 N 16 2
1953 Cal
1 A 300 N 3 23
" A 300 N 25 1
" A 300 N 32 1
81 A 245 N 15 2
" A 245 N 15 10
" A 245 N 15 14
319 A 299 N 8 2
" A 299 N 15 1
363 A 260 N 1 1
548 A 245 N 10 50
1954 Cal
67 A 261 N 4 26
" A 261 N 4 27
248 A 245 N 16 17
271 A 265 N 5 1
" A 265 N 5 16
335 A 299 N 15 1
591 A 245 N 8 102
" A 245 N 11 9
" A 246 N 9 3
" A 300 N 3 40
" A 300 N 6 1
1955 Cal
282 A 285 N 1 2
" A 289 N 2 1
" A 300 N 20 1
" A 300 N 21 4
581 A 300 N 10 1a
" A 300 N 15 3
1956 Cal
26 A 294 N 2 2

AIR HIMACHAL PRADESH

1952 Him Pra
16 A 300 N 15 2

AIR HYDERABAD

1951 Hyd
1 A 245 N 16 1
11 A 245 N 16 2
" A 245 N 16 11
" A 245 N 16 21
140 A 254 N 15 90
1952 Hyd
80 A 261 N 4 4
" A 261 N 4 7
" A 261 N 4 13
187 A 245 N 16 33
" A 254 N 1 2
" A 254 N 1 3
" A 254 N 2 8
" A 254 N 15 22
191 A 286 N 17 1
801 A 261 N 4 27
1953 Hyd
19 A 261 N 4 15
" A 261 N 4 20
" A 261 N 4 27
145 A 245 N 10 27
1954 Hyd
1 A 245 N 16 33
" A 265 N 5 19
" A 286 N 9 5
" A 286 N 9 10
" A 286 N 19 4
" A 286 N 21 2
" A 286 N 21 6
50 A 245 N 16 17
" A 246 N 11 13
" A 286 N 17 6
94 A 286 N 9 13
" A 286 N 17 2
121 A 246 N 9 1
" A 246 N 9 3
" A 246 N 9 4
" A 246 N 9 21
227 A 245 N 2 1
1955 Hyd
41 A 246 N 11 4
184 A 261 N 4 20
194 A 254 N 15 12
" A 254 N 15 90
257 A 245 N 6 1
" A 245 N 6 7
" A 245 N 6 9
" A 245 N 6 12
" A 245 N 6 14
" A 245 N 12 13
1956 Hyd
10 A 254 N 15 17
" A 254 N 15 83

AIR JAMMU & KASHMIR

1953 J & K
25 A 254 N 4 1
" A 254 N 4 2
" A 254 N 4 3
" A 254 N 5 4
" A 254 N 6 8
" A 254 N 15 12
1955 J & K
5 A 261 N 4 8
" A 261 N 4 10
" A 261 N 4 11
1955 J & K (con.)
5con A 261 N 4 23
" A 261 N 5 1

AIR LAHORE

1928 Lah
346 A 300 N 3 40
" A 300 N 3 146
" A 300 N 5 6
1930 Lah
364 A 299 N 4 1
" A 299 N 8 2
" A 299 N 10 1
1937 Lah
572 A 300 N 3 40
" A 300 N 3 150
" A 300 N 5 13
1939 Lah
298 A 300 N 12 2
498 A 254 N 15 90
583 A 300 N 12 2
1941 Lah
177 A 245 N 16 6
" A 246 N 9 3
" A 254 N 12 9
" A 254 N 16 1
1943 Lah
41 A 300 N 8 1
" A 300 N 8 2
" A 300 N 19 1
1944 Lah
33 A 245 N 11 1
" A 245 N 16 33
1948 Lah
120 A 246 N 15 9
" A 254 N 15 13
" A 254 N 15 22
" A 254 N 15 38
" A 254 N 15 48
1949 Lah
207 A 246 N 9 3
" A 246 N 14 2
" A 246 N 14 4
" A 246 N 14 7

AIR MADHYA BHARAT

1950 Madh-B
46 A 245 N 13 6
" A 299 N 8 2
1952 Madh-B
57 A 245 N 12 4
143 A 245 N 10 11
181 A 245 N 12 1
" A 245 N 12 3
" A 245 N 12 4
" A 248 N 4 1
1953 Madh-B
20 A 276 N 2 1
" A 276 N 3 1
" A 276 N 4 1
" A 277 N 3 2
" A 278 N 2 2
145 A 276 N 3 1
225 A 261 N 4 17
" A 261 N 4 19
" A 261 N 4 27
236 A 245 N 11 9
257 A 295 N 1 1
1954 Madh-B
111 A 246 N 8 16
196 A 265 N 4 32
" A 265 N 5 5
" A 265 N 6 13
" A 265 N 7 1
" A 265 N 7 2
206 A 245 N 12 2
1955 Madh-B
1 A 261 N 4 15
" A 261 N 4 17
" A 261 N 4 19
76 A 245 N 10 41
177 A 245 N 9 4
" A 245 N 10 41
" A 285 N 8 82
188 A 299 N 8 2

AIR MADRAS

1915 Mad
434 A 300 N 3 23
" A 300 N 3 138
" A 300 N 3 140
" A 300 N 5 20
" A 300 N 9 3
993 A 300 N 3 23
" A 300 N 3 47
" A 300 N 3 104
" A 300 N 3 138
" A 300 N 3 143
" A 300 N 5 3
1918 Mad
264 A 300 N 26 1
763 A 245 N 11 16
" A 245 N 11 20
1919 Mad
209 A 286 N 3 146
1930 Mad
55 A 265 N 4 13
1931 Mad
497 A 265 N 4 13
1934 Mad
516 A 300 N 3 103
1938 Mad
749 A 299 N 6 3
1939 Mad
361 A 246 N 8 5
" A 246 N 8 21
" A 246 N 9 3
663 A 300 N 3 23
" A 300 N 5 9
1941 Mad
270 A 286 N 3 146
533 A 254 N 6 2
" A 254 N 11 2
913 A 246 N 2 2
" A 246 N 8 17
" A 246 N 8 20
" A 286 N 18 4
1942 Mad
539 A 300 N 3 23
" A 300 N 3 138
" A 300 N 5 15
1945 Mad
19 A 254 N 15 90
211 A 247 N 7 8
" A 246 N 14 2
" A 246 N 14 4

1949 Mad
307 A 254 N 2 1
" A 254 N 9 6
" A 254 N 12 9
" A 254 N 12 24
" A 254 N 12 28
" A 254 N 12 30
" A 254 N 12 42
" A 254 N 12 49
" A 254 N 12 62
" A 254 N 21 6
481 A 246 N 4 1
" A 246 N 12 1
" A 252 N 1 1
500 A 276 N 3 1

1950 Mad
194 A 299 N 4 1
" A 299 N 6 9
" A 299 N 8 3
243 A 245 N 10 11
" A 245 N 10 43
293 A 261 N 4 27
324 A 245 N 6 12

1951 Mad
70 A 245 N 16 17
191 A 254 N 15 13
" A 254 N 15 90
583 A 245 N 15 2
" A 245 N 15 6
" A 245 N 15 10
855 A 299 N 4 1
" A 299 N 6 7
" A 299 N 6 9
" A 299 N 8 3
880 A 300 N 21 1
" A 300 N 33 1
979 A 246 N 8 31
" A 246 N 9 3
" A 248 N 2 3
" A 298 N 3 1

1952 Mad
127 A 245 N 11 1
" A 245 N 11 9
395 A 265 N 2 1
" A 265 N 5 13
" A 265 N 5 14
" A 265 N 6 5
" A 265 N 6 7
" A 265 N 6 15
" A 265 N 6 16
" A 265 N 6 17
" A 265 N 6 23
" A 276 N 6 1
613 A 245 N 13 3
" A 248 N 3 1
" A 265 N 4 10
" A 265 N 4 13
" A 265 N 6 3
835 A 298 N 5 1

1953 Mad
41 A 245 N 7 2
86 A 286 N 3 144
" A 286 N 3 148
" A 286 N 12 1
91 A 286 N 5 9
" A 286 N 7 1
105 A 245 N 8 89
" A 245 N 11 6
" A 245 N 11 7
" A 245 N 11 9
" A 265 N 5 17

1953 Mad *(con.)*
105*con* A 286 N 18 1
" A 286 N 18 2
" A 286 N 18 3
" A 286 N 18 13
" A 286 N 19 2
" A 286 N 20 13
" A 286 N 20 18
" A 286 N 20 19
" A 286 N 21 2
" A 286 N 21 6
" A 286 N 21 7
116 A 245 N 15 23
" A 286 N 1 3
" A 286 N 3 30
" A 286 N 3 109
" A 286 N 3 121
" A 286 N 3 136
" A 286 N 3 140
" A 286 N 5 5
" A 286 N 5 8
" A 286 N 8 1
" A 286 N 8 2
" A 286 N 8 7
" A 286 N 9 11
" A 286 N 9 12
" A 286 N 9 14
" A 286 N 11 1
" A 286 N 11 11
" A 286 N 12 6
" A 286 N 13 32
" A 236 N 13 33
" A 286 N 14 10
" A 286 N 14 14
" A 286 N 14 16
" A 286 N 14 17
" A 286 N 18 1
" A 286 N 18 2
" A 286 N 20 13
131 A 286 N 20 13
337 A 265 N 6 4
" A 265 N 8 1
476 A 265 N 6 13
729 A 245 N 16 83

1954 Mad
291 A 245 N 14 1
" A 245 N 15 1
" A 245 N 15 6
" A 245 N 15 24
" A 245 N 15 25
" A 245 N 15 26
" A 245 N 15 27
" A 245 N 15 28
" A 246 N 4 3
" A 246 N 8 23
" A 246 N 9 3
" A 246 N 9 28a
" A 246 N 13 17
" A 294 N 8 2
" A 297 N 1 1
" A 297 N 3 1
385 A 282 N 2 3
563 A 245 N 16 21
621 A 265 N 4 13
" A 286 N 12 10
643 A 277 N 3 1
704 A 246 N 15 15
" A 246 N 20 2
833 A 254 N 15 90
" A 265 N 11 2
" A 286 N 13 33

1954 Mad *(con.)*
833*con* A 286 N 20 18
" A 286 N 20 19
937 A 286 N 13 33
" A 286 N 14 13
984 A 286 N 13 45
993 A 246 N 8 29
" A 254 N 15 6
" A 254 N 15 80
" A 254 N 15 83
1029 A 286 N 13 7
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1030 A 245 N 11 9
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" A 286 N 18 1

1955 Mad
314 A 286 N 13 6
" A 286 N 13 8
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" A 286 N 13 33
" A 286 N 13 45
" A 286 N 21 5
" A 286 N 21 8
363 A 265 N 6 12
" A 286 N 20 3
502 A 286 N 8 6
" A 286 N 8 7
" A 286 N 9 15
722 A 286 N 13 12
" A 286 N 13 13
" A 286 N 13 40
" A 286 N 14 19
" A 286 N 14 20

AIR MANIPUR

1955 Manipur
49 A 299 N 9 2

AIR MYSORE

1951 Mys
72 A 245 N 10 27
" A 254 N 16 2
" A 254 N 17 3
" A 254 N 17 16

1952 Mys
69 A 261 N 4 24
" A 261 N 4 26
" A 261 N 4 27

1954 Mys
161 A 246 N 8 16
" A 246 N 8 23

1955 Mys
49 A 245 N 13 10
" A 265 N 5 9
" A 278 N 2 3
65 A 254 N 12 9
" A 254 N 15 80
" A 254 N 15 83
81 A 245 N 11 19

1956 Mys
7 A 245 N 10 31

AIR NAGPUR

1914 Nag
26 A 276 N 5 1

1943 Nag
36 A 250 N 4 1
287 A 300 N 3 28
312 A 254 N 21 10
" A 255 N 1 2

1945 Nag
171 A 265 N 9 1

1946 Nag
81 A 245 N 16 22
" A 254 N 12 57

1948 Nag
199 A 246 N 9 3
" A 246 N 14 4
" A 246 N 14 7
" A 254 N 12 9

1949 Nag
16 A 246 N 9 3
" A 254 N 10 1
134 A 250 N 5 3
190 A 276 N 3 1
215 A 276 N 3 1
" A 276 N 5 1

1951 Nag
33 A 248 N 2 5
58 A 245 N 2 1
" A 245 N 10 28
" A 245 N 16 19
" A 246 N 9 3
94 A 245 N 10 46
" A 254 N 9 4
" A 254 N 10 1
" A 254 N 10 2
317 A 245 N 2 1
" A 254 N 2 9
" A 254 N 9 3

1952 Nag
139 A 245 N 12 1
" A 245 N 12 7
" A 265 N 8 1
" A 265 N 11 1
213 A 300 N 3 23
378 A 245 N 16 16
" A 286 N 3 4
" A 286 N 3 30
" A 286 N 10 3
" A 286 N 12 2
" A 286 N 12 3
" A 286 N 12 4
" A 286 N 12 5
" A 286 N 15 5
" A 286 N 18 23
393 A 254 N 20 1

1953 Nag
40 A 245 N 12 6
" A 246 N 11 17
58 A 245 N 9 15
" A 245 N 9 44
" A 245 N 9 47
" A 245 N 9 48
" A 245 N 9 49
" A 245 N 10 47
" A 245 N 11 1
" A 245 N 16 19
" A 254 N 20 1
148 A 245 N 13 5

1955 Nag
11 A 245 N 15 1
99 A 245 N 13 3
" A 286 N 15 1
103 A 2[illegible] N 4 25
177 A 289 N 3 2
236 A 261 N 2 2a
" A 261 N 2a 1
" A 261 N 4 2
" A 261 N 4 25

1955 Nag *(con.)*
246 A245N8 28
" A245N8 89
" A245N9 49
" A245N11 9
1956 Nag
1 A246N14 2
" A246N15 4

AIR ORISSA
1950 Orissa
47 A246N9 3
" A265N4 10
" A265N4 13
157 A245N3 1
" A245N13 1
" A245N16 17
" A245N16 19
" A245N16 24
1951 Orissa
1 A254N2 5
" A254N2 7
" A254N9 2
" A265N4 13
105 A245N10 43
1952 Orissa
11 A245N11 15
244 A245N13 5
260 A245N10 10
" A245N10 31
" A245N11 1
" A245N11 9
" A254N21 1
" A254N21 3
" A254N21 4
1953 Orissa
185 A245N11 9
" A245N16 16
" A246N11 11
" A246N11 13
" A246N11 15
" A246N11 16
" A246N11 19
233 A245N11 20
331 A286N3 4
" A286N10 5
1954 Orissa
186 A254N12 5
" A254N21 1
1955 Orissa
122 A286N3 125
" A286N3 1[illegible]5
" A286N3 146
" A286N3 149
172 A286N3 2
" A286N3 109
" A286N10 2
175 A265N4 9
" A265N4 13

AIR OUDH
1931 Oudh
29 A300N3 24
" A300N5 16
" A300N7 1
" A300N7 2

AIR PATNA
1939 Pat
49 A246N4 5
" A254N12 7

1939 Pat *(con)*
55 A254N5 1
" A254N12 1
" A254N12 27
" A254N12 31
90 A254N15 90
1941 Pat
99 A246N4 5
" A246N9 3
" A254N12 57
" A254N12 60
" A254N17 3
1942 Pat
351 A245N16 19
1943 Pat
346 A245N6 12
1944 Pat
54 A254N15 83
303 A246N10 1
" A254N6 4
" A254N6 6
" A254N12 56
" A254N12 58
" A254N21 1
1945 Pat
444 A246N14 2
" A246N14 4
1946 Pat
146 A258N1 1
1947 Pat
16 A245N11 9
1949 Pat
1 A245N10 41
" A246N9 3
" A246N14 4
" A246N14 7
299 A248N2 6
1950 Pat
35 A245N16 19
" A246N9 3
" A254N12 6
" A254N12 9
" A254N12 56
228 A245N16 11
" A246N15 15
265 A254N2 1
" A254N7 1
332 A246N9 33
" A254N12 9
" A254N12 34
" A254N12 61
" A254N15 80
392 A248N2 1
1951 Pat
91 A246N9 3
" A246N15 18
246 A245N16 33
" A245N16 34
" A254N21 7
" A254N21 8
1952 Pat
39 A246N9 3
" A246N9 25
106 A246N9 24
" A265N5 10
166 A245N4 12
" A245N6 9
" A245N13 4

1952 Pat *(con)*
166*con* A245N16 17
194 A245N4 12
" A245N6 11
220 A245N9 49
" A245N11 9
359 A245N8 101
" A245N11 9
" A245N16 17
" A245N16 18
" A246N8 31
" A246N9 3
" A246N9 24
" A246N9 30
" A265N4 4
" A265N5 10
" A265N6 10
" A265N6 24
393 A299N5 1
" A299N8 1
1953 Pat
14 A254N6 3
" A254N15 1
" A254N15 7
" A254N15 13
" A254N15 21
" A254N15 57
" A254N15 67
" A254N15 71
" A254N15 77
" A254N15 83
" A254N15 89
" A254N16 2
" A254N17 17
" A254N21 9
65 A245N16 16
" A246N9 3
78 A286N20 13
87 A245N15 23
" A254N12 9
" A286N3 4
" A286N3 42
" A286N3 117
" A286N20 13
105 A245N16 17
" A246N9 3
337 A246N9 3
1954 Pat
164 A245N15 8
254 A245N16 17
262 A245N15 6
" A245N16 17
266 A245N16 17
" A245N16 18
" A248N3 1
371 A245N9 4
513 A299N16 1
" A300N3 5
" A300N3 23
" A300N3 138
" A300N16 1
529 A300N3 23
" A300N5 10
1955 Pat
1 A245N4 12
" A245N6 10
" A245N6 12
" A245N12 2
" A245N13 3
" A245N16 20
" A246N7 1

1955 Pat *(con)*
1*con* A246N11 1
" A254N12 6
" A254N12 9
" A254N12 10
" A254N12 36
" A254N15 83
" A254N15 88
445 A245N11 9
470 A246N4 1

AIR PEPSU
1952 Pepsu
12 A246N8 23
1953 Pepsu
196 A299N15 2
" A299N15 3
1954 Pepsu
34 A296N2 2
" A296N3 2
1955 Pepsu
129 A245N16 19
1956 Pepsu
3 A266N4 8
" A289N3 1a
" A298N2 1

AIR PESHAWAR
1950 Pesh
1 A246N9 3

AIR PUNJAB
1951 Punj
225 A261N4 27
409 A254N2 10
" A254N5 3
" A254N7 2
" A254N9 4
" A254N9 5
" A254N12 4
" A254N17 1
" A254N17 3
" A254N17 4
" A254N21 3
1952 Punj
9 A246N9 3
55 A245N16 5
309 A245N13 4
1953 Punj
1 A245N11 20
77 A245N11 9
137 A300N15 1
1954 Punj
21 A216N15 14
37 A230N1 2
167 A246N7 1
241 A254N12 5
" A254N12 53
" A254N15 90
" A254N20 2
264 A245N15 9
" A265N5 11
" A265N5 13
1955 Punj
240 A239N8 22

A I R RAJASTHAN

1951 Raj
94 A245 N12 4
" A245 N12 7
139 A265 N10 2

1953 Raj
145 A277 N5 2
" A277 N6 1
" A278 N2 1
" A278 N2 2
" A295 N1 2
180 A265 N5 5
" A265 S10 2
204 A261 N4 21
" A261 N4 27

1954 Raj
4 A261 N4 21
" A261 N4 27
162 A265 N5 5
178 A265 N4 2
" A265 N4 8
" A265 N4 13
" A265 N4 20
178 A265 N4 21
" A265 N5 1
" A265 N5 7
" A265 N6 13
" A265 N7 2
224 A245 N10 45
252 A245 N10 41
" A245 N10 45
" A254 N12 6
" A254 N15 80
" A254 N15 83

RANGOON A I R RANGOON

1927 Rang
14 A299 N5 1

1931 Rang
294 A300 N3 24
" A300 N3 138
" A300 N3 147
" A300 N3 149
" A300 N5 15
" A300 N5 21

1937 Rang
89 A300 N3 3
" A300 N3 107

A I R SAURASHTRA

1951 Sau
69 A245 N10 27

1952 Sau
90 A261 N4 4
" A261 N4 9
" A261 N4 27

1953 Sau
21 A295 N1 3

1954 Sau
123 A261 N4 4
" A261 N4 5
" A261 N4 15
" A261 N4 16

1955 Sau
90 A276 N2 1
" A276 N3 1

A I R TRAVANCORE COCHIN

1951 Trav-Co
203 A254 N15 22
" A254 N15 43
" A254 N15 45
" A254 N15 63
" A254 N17 20

1952 Trav-Co
83 A286 N13 21
" A286 N13 42
89 A261 N4 27
371 A254 N15 22
" A254 N15 44
" A254 N17 20
455 A245 N11 9

1953 Trav-Co
41 A254 N5 5
" A254 N6 1
53 A255 N1 1
146 A265 N2 3
" A265 N5 4
" A265 N5 5
" A265 N6 1
" A265 N10 2
" A299 N5 1
327 A254 N12 9
" A254 N15 83
392 A261 N2 7
540 A24 N14 4
" A246 N14 7
556 A286 N10 6

1954 Trav-Co
34 A246 N5 1
" A246 N9 3

1954 Trav-Co *(con)*
137 A277 N2 2
257 A245 N16 19
" A245 N16 24
358 A261 N2 1
" A261 N4 16
" A261 N4 27
504 A265 N4 13
" A265 N4 31
" A265 N5 7
" A265 N6 13

1955 Trav-Co
18 A286 N17 2
" A236 N17 8
220 A154 N12 35
" A254 N15 90
" A286 N20 18
" A286 N20 19

1956 Trav-Co
19 A254 N11 3
" A254 N15 1
" A254 N15 21
" A254 N15 80
" A254 N15 90

A I R VINDHYA PRADESH

1952 Vind Pra
39 A245 N9 44

1954 Vind Pra
24 A254 N2 1
" A254 N3 1
" A254 N3 2
" A254 N15 83
" A254 N15 90

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147 A245 N10 41
506 A299 N3 1
" A299 N8 2
" A299 N9 2
" A299 N9 11
" A299 N13 2
675 A286 N17 3
" A186 N17 6
" A285 N17 7
1126 A265 N4 12
" A276 N3 1
1341 A245 N10 10

1955 N U C *(con)*
1548 A245 N11 1
1561 A286 N10 6
1562 A286 N9 16
" A286 N9 17
" A286 N10 6
1694 A276 N3 1
" A276 N5 1
1732 A245 N11 9
1788 A265 N5 18
1887 A245 N11 9
" A245 N16 19
2368 A245 N12 2

1955 N U C *(con)*
2421 A245 N8 89
" A245 N8 106
" A245 N9 56
" A245 N11 9
" A245 N16 15
2681 A245 N13 1
" A245 N13 5
" A245 N16 2
2912 A294 N3 1
4433 A294 N3 2
4499 A299 N5 2
" A299 N6 8

1955 N U C *(con)*
4499 *(con)* A299 N11 4
4995 A276 N2 3
5377 A254 N12 9
" A254 N15 83
5624 A245 N16 11
5693 A254 N20 3
5838 A286 N8 7
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" A286 N11 3
" A286 N11 7
5922 A245 N11 9
6123 A254 N21 1

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10 A300 N3 63
" A300 N3 66
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5 I A
178 See 4 Cal 172

30 I A
220 See 26 Mad 544

72 I A
57 See 1945 P C 48
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59 See 1946 P C 66
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74 I A
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75 I A *(con)*
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1951 S C R
1 See 1951 S C 23
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1951 S C R *(con)*
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1952 S C R
1 See 1951 S C 23
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1112 See 1952 S C 366
1953 S C R
1 See 1952 S C 369
302 See 1953 S C 58
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655 See 1953 S C 250
677 See 1953 S C 274
773 See 1953 S C 244
1049 See 1953 S C 373
1069 See 1953 S C 252
1129 See 1953 S C 215
1184 See 1953 S C 384
1954 S C R
1 See 1953 S C 375
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958 See 1954 S C 165
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1055 See 1954 S C 388
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1117 See 1954 S C 314
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31	32	33	34	35	36	37	
1904	1905	1906	1907	1908	1909	1910	
38	39	40	41	42	43	44	
1911	1912	1913	1914	1915	1916	1917	
45	46	47	48	49	50	51	
1918	1919	1920	1921	1922	1923	1924	
52	53	54	55	56	57	58	
1925	1926	1927	1928	1929	1930	1931	
59	60	61	62	63	64	65	
1932	1933	1934	1935	1936	1937	1938	
66	67	68	69	70	71	72	73
1939	1940	1941	1942	1943	1944	1945	1946
74	75	76					
1947	1948	1949					

Indian Cases

1–4	5-8	9-12	13–17	18–21	22-25
1909	1910	1911	1912	1913	1914
26–31	32–36	37–42	43-48	49–53	54–58
1915	1916	1917	1918	1919	1920
59–64	65–70	71–77	78–84	85–91	92–98
1921	1922	1923	1924	1925	1926
99–106	107–112	113-120	121–128	129–134	
1927	1928	1929	1930	1931	
135 140	141–146	147–152	153–158	159–165	
1932	1933	1934	1935	1936	
166–172	173–178	179–184	185–190	191–196	
1937	1938	1939	1940	1941	
197–203	204–209	210–215	216–221	222–227	
1942	1943	1944	1945	1946	
228–230					
1947					

Indian Jurist

1	2	3	4	5	6	7
1877	1878	1879	1880	1881	1882	1883
8	9	10	11	12	13	14
1884	1885	1886	1887	1888	1889	1890
15	16	17				
1891	1892	1893				

Indian Rulings

IR 1929	IR 1930	IR 1931	IR 1932	6
1929	1930	1931	1932	1933–1934
7	8	9	10	
1934–1935	1935–1936	1936–1937	1937–1938	
11	12	13	14	
1938–1939	1939–1940	1940–1941	1941–1942	

Indian Rulings *(contd.)*

15	16	17	18
1942–1943	1943–1944	1944–1945	1945–1946
19			
1946–1947			

(I. L. R.) Karachi

ILR 1939 Kar
1939
Citation by year.

Kerala Law Times

1949 K L T
1949
Citation by year

Knapp's Reports, Privy Council

1	2	3
1829–31	1831–34	1834–36

(I. L. R.) Lahore

1	2	3	4	5	6	7
1920	1921	1922	1923	1924	1925	1926
8	9	10	11	12	13	14
1927	1928	1929	1930	1931	1932	1933
15	16	17				
1934	1935	1936				

From 1937 to 1947 citation by year

(Pak. L. R) Lahore

Pak. L. R. 1948 Lahore
1948
Citation by year.

Lahore Law Journal

1	2	3	4	5	6	7
1919	1920	1921	1922	1923	1924	1925
8						
1926						

Law Reporter, Allahabad

1	2	3	4	5	6	7
1920	1921	1922	1923	1924	1925	1926
8	9	10	11	12	13	14
1927	1928	1929	1930	1931	1932	1933
15	16	17				
1934	1935	1936				

Lower Burma Rulings

1	2	3	4
1900–1902	1903–1904	1905–1906	1907–1908
5	6	7	8
1909–1910	1911–1912	1913–1914	1915–1916
9	10	11	
1917–1918	1919–1920	1921–1922	

(I. L. R.) Lucknow

1	2	3	4	5	6	7
1926	1927	1928	1929	1930	1931	1932
8	9	10	11	12	13	14
1933	1934	1935	1936	1937	1938	1939
15	16	17	18	19	20	21
1940	1941	1942	1943	1944	1945	1946
22	23					
1947	1948					

(I. L. R.) Madras

1	2	3	4–5	6		
1876–1878	1878–1880	1881	1882	1883		
7	8	9	10	11	12	13
1884	1885	1886	1887	1888	1889	1890
14	15	16	17	18	19	20
1891	1892	1893	1894	1895	1896	1897
21	22	23	24	25	26	27
1898	1899	1900	1901	1902	1903	1904
28	29	30	31	32	33	34
1905	1906	1907	1908	1909	1910	1911

CHRONOLOGICAL TABLE OF INDIAN REPORTS

(I. L. R.) Madras *(contd.)*

35	36	37	38	39	40	41
1912	1913	1914	1915	1916	1917	1918
42	43	44	45	46	47	48
1919	1920	1921	1922	1923	1924	1925
49	50	51	52	53	54	55
1926	1927	1928	1929	1930	1931	1932
56	57	58	59	From 1937 citation		
1933	1934	1935	1936	is by year.		

Madras High Court Reports

1	2	3	4
1862-1863	1864–1865	1866–1868	1868–1869
5	6	7	8
1869–1870	1870–1871	1871–1874	1874–1875

Madras Law Journal

1	2	3	4	5	6	7
1891	1892	1893	1894	1895	1896	1897
8	9	10	11	12	13	14
1898	1899	1900	1901	1902	1903	1904
15	16	17	18	19	20	21
1905	1906	1907	1908	1909	1910	1911
22–23	24–25	26–27	28–29	30–31	32–33	
1912	1913	1914	1915	1916	1917	
34–35	36–37	38-39	40–41	42–43	44–45	
1918	1919	1920	1921	1922	1923	
46–47	48–49	50–51	52–53	54–55	56–57	
1924	1925	1926	1927	1928	1929	
58–59	60–61	62–63	64–65	66–67	68–69	
1930	1931	1932	1933	1934	1935	
70–71						
1936	From 1937 citation is by year.					

Madras Law Times

1	2	3–4	5–6	7–8	9–10	11-12
1906	1907	1908	1909	1910	1911	1912
13–14	15–16	17–18	19–20	21–22	23–24	
1913	1914	1915	1916	1917	1918	
25–26	27–28	29	30–31	32–33	34–35	
1919	1920	1921	1922	1923	1924	

Madras Law Weekly

1	2	3–4	5–6	7–8	9–10	11–12
1914	1915	1916	1917	1918	1919	1920
13-14	15–16	17–18	19–20	21–22	23–24	
1921	1922	1923	1924	1925	1926	
25-26	27–28	29–30	31–32	33–34	35–36	
1927	1928	1929	1930	1931	1932	
37–38	39–40	41–42	43-44	45–46	47–48	
1933	1934	1935	1936	1937	1938	
49–50	51–52	53–54	55	56	57	
1939	1940	1941	1942	1943	1944	
58	59	60	61	62	63	64
1945	1946	1947	1948	1949	1950	1951
65	66	67	68	69		
1952	1953	1954	1955	1956		

Madras Weekly Notes

1910 MWN	
1910	Citation by yaar.

Moore's Indian Appeals

1	2	3	4
1836–1837	1837–1841	1841–1846	1846–1851
5	6	7	8
1851–1854	1854–1857	1857–1859	1859–1861
9	10	11	12
1861–1863	1863–1866	1866–1867	1867–1869
13	14		
1869–1870	1870–1872		

Mysore Law Reports

1	2	3	4	5	6	7
1878	1879	1880	1881	1882	1883	1884
8	9	10	11	12	13	14
1885	1886	1887	1888	1889	1890	1891
15	16	17	18			
1892	1893	1894	1895			

Mysore Chief Courts Reports

1	2	3	4	5	6	7
1896	1897	1898	1899	1900	1901	1902
8	9	10	11	12	13	14
1903	1904	1905	1906	1907	1908	1909
15	16	17	18	19	20	21
1910	1911	1912	1913	1914	1915	1916
22	23	24	25	26	27	28
1917	1918	1919	1920	1921	1922	1923
29	30	31	32	33	34	35
1924	1925	1926	1927	1928	1929	1930

Mysore High Court Reports

36	37	38	39	40	41	42
1931	1932	1933	1934	1935	1936	1937
43	44	45	46	47	48	49
1938	1939	1940	1941	1942	1943	1944
50	51	52	53	54	55	From
1945	1946	1947	1948	1949	1950	

1951 citation is by year.

(I. L. R.) Mysore

ILR (1951) Mys. citation by year.

Mysore Law Journal

26	27	28	29	30	31	32
1948	1949	1950	1951	1952	1953	1954
33	34					
1955	1956					

(I. L. R.) Nagpur

ILR 1936 Nag	Citation by year.
1936	

Nagpur Law Journal

1	2	3	4	5	6	7
1918	1919	1920	1921	1922	1923	1924
8	9	10	11	12	13	14
1925	1926	1927	1928	1929	1930	1931
15	16	17	18	19	20	From
1932	1933	1934	1935	1936	1937	

1938 citation is by year.

Nagpur Law Reports

1	2	3	4	5	6	7
1905	1906	1907	1908	1909	1910	1911
8	9	10	11	12	13	14
1912	1913	1914	1915	1916	1917	1918
15	16	17	18	19	20	21
1919	1920	1921	1922	1923	1924	1925
22	23	24	25	26	27	28
1926	1927	1928	1929	1930	1931	1932
29	30	31				
1933	1934	1935				

North-West Provinces High Court Reports

1	2	3	4	5	6	7
1869	1870	1871	1872	1873	1874	1875

Oudh Cases

1	2	3	4	5	6	7
1898	1899	1900	1901	1902	1903	1904

Oudh Cases *(contd.)*

8	9	10	11	12	13	14
1905	1906	1907	1908	1909	1910	1911
15	16	17	18	19	20	21
1912	1913	1914	1915	1916	1917	1918
22	23	24	25	26	27	28
1919	1920	1921	1922	1923	1924	1925
29						
1926						

Oudh Law Journal

1	2	3	4	5	6	7
1914	1915	1916	1917	1918	1919	1920
8	9	10	11	12	13	
1921	1922	1923	1924	1925	1926	

Oudh Law Reports

1934 OLR
1934
Citation by year.

Oudh Weekly Notes

1	2	3	4	5	6	7
1924	1925	1926	1927	1928	1929	1930
8	9	10	11			
1931	1932	1933	1934			

From 1935 citation is by year.

(I. L. R.) Patna

1	2	3	4	5	6	7
1922	1923	1924	1925	1926	1927	1928
8	9	10	11	12	13	14
1929	1930	1931	1932	1933	1934	1935
15	16	17	18	19	20	21
1936	1937	1938	1939	1940	1941	1942
22	23	24	25	26	27	28
1943	1944	1945	1946	1947	1948	1949
29	30	31	32	33	34	35
1950	1951	1952	1953	1954	1955	1956

Patna High Court Cases

1917 PHCC
1917
Citation by year.

Patna Law Journal

1	2	3	4	5	6
1916	1917	1918	1919	1920	1921

Patna Law Reports

1	2	3
1923	1924	1925

Patna Law Times

1	2	3	4	5	6	7
1920	1921	1922	1923	1924	1925	1926
8	9	10	11	12	13	14
1927	1928	1929	1930	1931	1932	1933
15	16	17	18	19	20	21
1934	1935	1936	1937	1938	1939	1940
22	23	24	25	26	27	28
1941	1942	1943	1944	1945	1946	1947
29	30					
1948	1949					

Patna Law Weekly

1	2–3	4–5
1916	1917	1918

Patna Weekly Notes

1936 PWN
1936
Citation by year.

Pepsu Law Reports

1	2	3
1949	1950	1951

I. L. R. (Patiala)

From 1952 citation by year.

Punjab Law Reporter

1900 PLR
1900
Citation by year upto 1923 and then

27	28	29	30	31	32	33
1926	1927	1928	1929	1930	1931	1932
34	35–36	37	38	39	40	41
1933	1934	1935	1936	1937	1938	1939
42	43	44	45	46	47	48
1940	1941	1942	1943	1944	1945	1946
49	50	51	52	53	54	55
1947	1948	1949	1950	1951	1952	1953
56	57	58				
1954	1955	1956				

Punjab Records

1872 PR
1872
Citation by year.

Punjab Weekly Reporter

1905 Pun W R
1905
Citation by year.

(I. L. R.) Rangoon

1	2	3	4	5	6	7
1923	1924	1925	1926	1927	1928	1929
8	9	10	11	12	13	14
1930	1931	1932	1933	1934	1935	1936

Rangoon Law Reports

1937 RLR
1937
Citation by year up to 1947.

Sind Law Reporter

1	2	3	4	5	6	7
1907	1908	1909	1910	1911	1912	1913
8	9	10	11	12	13	14
1914	1915	1916	1917	1918	1919	1920
15	16	17	18	19	20	21
1921	1922	1923	1924	1925	1926	1927
22	23	24	25	26	27	28
1928	1929	1930	1931	1932	1933	1934
29	30	31	32			
1935	1936	1937	1938			

Supreme Court Reports

1	2	3	4	5
1950	1951	1952	1953	1954

1955 (1)
1955 (2)

Sutherland's Weekly Reporter

1	2–4	5–6	7–8	9–10	11–12	13–14
1864	1865	1866	1867	1868	1869	1870
15–16	17–18	19–20	21–22	23–24	25	26
1871	1872	1873	1874	1875	1876	1877

Travancore-Cochin Law Reports

1949
1949
Citation by year.

United Provinces Law Reports

1	2	3
1919	1920	1921

Upper Burma Rulings

1 Cri	2 Civ
1892–1903	1892–1903

From 1904 citation by year upto 1913 and then

2	3	4
1914–1916	1917–1920	1921–1922

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